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Supreme Court, U.S.
FILED

No. 03 - 94 JUL 15 2003

In The
Supreme Court of the United States

KYLE P. CHRISTENBERRY, M.D.,
W. NEWTON GODFREE, M.D.,

Petitioners,

v.

KATHY ALLEN,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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81 pp

QUESTION PRESENTED

1. Whether the Eleventh Circuit committed reversible error by holding that removal to federal court by federal contractors under the Westfall Act is limited to a 30 day period by virtue of 28 U.S.C. § 1446(b).

Alternatively, whether Kyle P. Christenberry, M.D. and W. Newton Godfree, M.D., contractors of a federally supported health center funded under § 330 of the Public Health Service Act, properly and timely removed a case to District Court when the Secretary of Health and Human Services and the Attorney General had failed and refused to certify Petitioners as federal contractors under the Federal Tort Claims Act.

LIST OF PARTIES

The parties to the proceeding are:

Petitioners:

KYLE P. CHRISTENBERRY, M.D. and W. NEWTON GODFREE, M.D.

Respondent:

KATHY ALLEN

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kyle P. Christenberry, M.D. and W. Newton Godfree, M.D. respectfully petition for a writ of certiorari to review the April 16, 2003 Opinion of the Eleventh Circuit Court of Appeals reversing the District Court's order holding Petitioners timely and properly removed the case to the District Court.

OPINIONS BELOW

The decision of the U.S. District Court for the Northern District of Alabama denying the Motion to Remand, concluding Petitioners had timely and properly removed the case, and holding Petitioners are entitled to the protections of 42 U.S.C. § 233(a) is not reported. The decision of the Eleventh Circuit, reversing the District Court's order denying the Motion to Remand, is published as *Kathy Allen v. Christenberry*, 327 F.3d 1290 (11th Cir. 2003).

STATEMENT OF JURISDICTION

Petitioners removed the case from state court to the U.S. District Court for the Northern District of Alabama based on 42 U.S.C. § 233, 28 U.S.C. § 1331, 28 U.S.C. § 1446(b), and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346; 2672-80. Respondent appealed the District Court's Order denying the Motion to Remand under the authority of 28 U.S.C. § 1292(b). This Court has jurisdiction to review the decision of the Eleventh Circuit under 28 U.S.C. § 1254(1).

The judgment of the Eleventh Circuit was entered on April 16, 2003. A Petition for Rehearing was denied on May 28, 2003.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part that: "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law * * * ." The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty or property without due process of law * * * ." The Eleventh Circuit's Opinion effectively deprives federal contractors, who would otherwise be entitled to immunity under the FTCA, any meaningful review of any adverse agency decision. Unless certiorari is granted, an Alabama state court will proceed to take property of federal employees without meaningful review.

STATEMENT

This Petition arises out of Plaintiff Kathy Allen's medical malpractice action filed against Drs. Christenberry and Godfree, physicians practicing obstetrics in Etowah County, Alabama. During the time period of November 21, 1996 to November 23, 1996, the Defendants provided care and treatment to Plaintiff Kathy Allen while she was an inpatient at Gadsden Regional Medical Center. App. 15.

During the period of time they provided medical services to the Plaintiff, Christenberry and Godfree provided on-call services for the Etowah Quality of Life "EQOL."[1] App. 13-14. The services provided by

[1] EQOL is a federally supported health center funded under 330 of the Public Health Service Act. EQOL is a deemed entity and eligible for Federal Tort Claims Coverage. App. 13.

Christenberry and Godfree were pursuant to a contract with EQOL. App. 13-14. The physicians provided in-hospital obstetrical, gynecological and other-related medical services required of EQOL. App. 13-14. All of the treatment rendered in this case arises out of services provided to the Plaintiff pursuant to Christenberry and Godfree's contract with EQOL. App. 13-14. Christenberry and Godfree did not charge anything for the services they provided apart from the compensation which was received under the contract with EQOL. App. 15.

On May 20, 1996, Dr. Larry Grimes executed on behalf of himself, Dr. W. Newton Godfree, Dr. James R. Phillips, and Dr. Kyle P. Christenberry a contract with EQOL. App. 13-14. It was through the provisions of the contract with EQOL that the obstetrical services were provided to Kathy Allen which later became the subject of this medical malpractice action. App. 13-15.

In June 1996, the Secretary of HHS deemed Drs. Christenberry and Godfree to be federal employees. Attached to the Petition for Rehearing filed with the Eleventh Circuit was the declaration of Susan P. Lewis, a list of employees of EQOL for whom FTCA coverage was sought, and the deeming letter of June 21, 1996. These documents were attached to a pleading filed with the District Court by the United States, and are part of the record in this case.

Christenberry and Godfree were served with the Plaintiff's Complaint on June 17 and 18, 1997, respectively. App. 15. On July 1, 1997, Wayne Rowe, the Chief Executive Officer of EQOL, made a written request of the Office of the General Counsel for the Department of Health and Human Services ("HHS") to move to dismiss the doctors as named defendants or to defend the lawsuit

on behalf of Drs. Christenberry and Godfree.[2] App. 15-16. With the July 1, 1997 letter, Rowe attached the Complaint that indicated Christenberry and Godfree were defendants in a medical malpractice action, and forwarded a copy of the contract executed by EQOL and the physicians. App. 15-16.

On July 17, 1997, Elizabeth Jordan Gianturco, Chief Litigation Branch, HHS, responded to Rowe's request as follows:

> Before this office can request representation by the Department of Justice for the above captioned case, we must determine whether the health center and its personnel are covered under the Federal Tort Claims Act and were working within the scope of the grant and their employment with respect to the allegations. We will need the following additional information as quickly as possible. The information provided should pertain to the date of the alleged incident which in this case appears to be November 23, 1996.
>
> 1. A copy of your center's deeming letter.
>
> 2. Copies of a valid medical license or certificate which was in effect at the time of the alleged negligence for each individual practitioner involved.
>
> 3. A statement from you or someone in authority that the practitioner was not billing privately for services to any center patients.

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[2] Rowe is the person designated by the Secretary of HHS to receive complaints against EQOL and/or its contractors. App. 15-16, n.8. Rowe forwarded the Plaintiff's Complaint to the address that was supplied to EQOL by HHS. App. 15-16.

4. A copy of all of the plaintiff's medical records from the health center and any private facility that might be involved.

5. A copy of all insurance policies providing coverage of any type to the health center and the involved individuals.

6. A narrative statement regarding the facts of the alleged incident by the practitioner, the medical director or someone familiar with the events.

Please send a copy of all the documents that you send to us to:

Roger Einerson
Torts Branch
Civil Division
Department of Justice
Post Office Box 898
Ben Franklin Station
Washington, D.C. 20044

We ask that you provide these documents with labels matching our requests. Also, we ask that you check carefully to make certain that the dates of the documents match the dates of the events. If you have any questions please call 202-619-0182 and leave a message, a telephone number or a FAX number. Neither the Department of Justice nor this office can take any action on this matter until we receive the requested information.

App. 16-18. The Department did not defend the lawsuit and took no action in response to the letters of July 17, 1997 and August 4, 1997. App. 18.

On November 12, 1997, counsel for Christenberry and Godfree wrote the FTCA Coordinator of the Public Health Service as follows:

> This follows our telephone conference November 12, 1997. We are defending Dr. W. Newton Godfree and Dr. Kyle P. Christenberry obstetricians practicing in Gadsden, Alabama.
>
> Enclosed are copies of the following items:
>
> 1. Complaint filed by Kathy Allen in the Circuit Court of Etowah County, Alabama, Civil Action No. CV-97-674-RSM.
> 2. Motion to dismiss filed for defendants, W. Newton Godfree, M.D., and Kyle P. Christenberry, M.R.
> 3. Plaintiff's response to motion to dismiss filed by Mr. Douglas Burns, attorney for the plaintiff.
> 4. Plaintiff's supplemental response to motion to dismiss filed by Mr. John S. Morgan, also an attorney with the law firm representing the plaintiff.
>
> I have received and thank you for Standard From 95.
>
> Thank you very much for your attention in this matter.

App. 18-19. The United States conceded in a brief filed with the District Court that Rowe complied with these instructions.

On November 16, 2001, counsel for Christenberry and Godfree renewed the request that Christenberry and Godfree be deemed federal employees. App. 20. Correspondence was sent to Jeffrey Axelrad of the Department of Justice seeking a determination as to the employment

status of Drs. Christenberry and Godfree.[3] App. 20. That letter stated as follows:

> This firm represents Drs. Christenberry and Godfree in a civil action brought by Kathy Allen, as mother of deceased infant, Dakota Allen. A copy of the complaint is enclosed. Both of my clients were working as contractors with the Quality of Life Health Services, Inc., a federally-supported health center funded under Section 330 of the Public Health Service Act. Enclosed is a copy of a letter to Phyllis Hastings of the Office of General Counsel from Wayne Rowe, CEO of Quality of Life.
>
> Also enclosed is a note written by Dr. Christenberry concerning the services he and his partner, Dr. Godfree, provided Ms. Allen. Neither physician billed the patient privately for this service. I am also enclosing a copy of a contract between Etowah Quality of Life and the subject physicians.
>
> It has been previously requested that a defense be provided to my clients by the Department of Justice. However, this request apparently was never processed. We are now preparing to go to trial on November 26, 2001, in the Circuit Court of Etowah County, Alabama.

[3] The November 16, 2001 letter was sent to the same Department of Justice address which Rowe presumably copied when he complied with Gianturco's instructions in her July 17, 1997 correspondence. Yet the United States took the remarkable position that the November 16, 2001 letter was its first notice of this claim. Although the United States has acknowledged that it received the August 1997 Rowe letter, it offered no explanation as to why it refused to respond.

> The purpose of this letter is to request a certification by the attorney general that my clients were acting within the scope of their employment with this federally-supported program for purposes of substitution of the United States as a party defendant under the Federal Torts Claims Act.
>
> In light of the fact that this case is set for trial November 26, we are obviously under serious time constraints. Accordingly, your expedited attention to this matter is greatly appreciated.
>
> You may contact Mr. Wayne Rowe, CEO of Quality of Life, at 256/492-0131. Also, I would appreciate your contacting the undersigned Monday to confirm this request.

App. 20-22. The letter was forwarded to Constance L. Foster, Acting Chief, Litigation Branch of HHS, on November 19, 2001. App. 22. Despite the prior determination in June of 1996, by the Secretary of HHS that Drs. Christenbery and Godfree were deemed to be federal employees, on November 20, 2001, Foster informed counsel that HHS had determined that "neither Dr. Christenberry nor Dr. Godfree may be deemed to be employees of the Public Health Service pursuant to the Federally Supported Health Centers Assistance Act." App. 22. According to Foster, this decision was based on the fact that Drs. Christenberry and Godfree "did not contract directly with the health center but instead provided services pursuant to an intermediate contract signed by a representative of their practice group." App. 22. The letter from the Department also stated that "[b]y operation of 42 U.S.C. § 233(b)(1)(F), the determination by the Department of Health and Human Services that Dr. Christenberry and Dr. Godfree shall not be deemed to be employees of the Public Health Service is final and binding upon the

Attorney General and the parties to your action in State court." App. 22, n.15.

On the same day (November 20, 2001), the United States of America by and through the United States Attorney for the Northern District of Alabama filed a notice in the Circuit Court of Etowah County, Alabama, that the Secretary of Health and Human Services *"has under consideration"* whether Drs. Christenberry and Godfree are to be deemed employees of the Public Health Service. App. 23. The notice was filed pursuant to 42 U.S.C. § 233(l)(1). App. 23. The notice stated that on November 16, 2001, the Attorney General of the United States was first notified of the existence of the action by virtue of a letter dated November 16, 2001, from private counsel for defendants Christenberry and Godfree to the Director of Torts Branch, Civil Division, U.S. Department of Justice. App. 23. It also provided that the notice filed by the United States was timely pursuant to 42 U.S.C. § 233(l)(1). App. 23.

On November 21, 2001, Christenberry and Godfree removed this case to the United States District Court for the Northern District of Alabama. App. 23. All Defendants consented in the removal. App. 23.

The District Court denied the Plaintiff's Motion to Remand concluding:

> (1) The defendants Christenberry and Godfree timely gave the only notice that they were required to give to their 'immediate superior.'
>
> (2) The defendants Christenberry and Godfree were included as independent contractors covered by the contract with EQOL and were, thus, entitled to the protections afforded under 42 U.S.C. § 233(a).

> (3) The action has been timely removed by the defendants or by operation of law, has been or should have been removed by the Attorney General.

App. 43.

The Eleventh Circuit reversed the District Court's Order denying the Motion to Remand. App. 1-12. However, interestingly, the Eleventh Circuit did not reverse the Order in as far as it concluded (1) Christenberry and Godfree timely gave the only notice that they were required to give to their immediate superior, (2) Christenberry and Godfree were included as independent contractors covered by the contract with EQOL, and (3) Christenberry and Godfree were entitled to the protections afforded under 42 U.S.C. § 233(a). App. 12. The Eleventh Circuit held removal was improper as the Attorney General never notified the state court that HHS had determined Christenberry and Godfree were deemed employees of the Public Health Service, the Attorney General did appear in state court notifying the court that a decision had not been made as to whether Christenberry and Godfree were deemed employees of the Public Health Service, which precluded removal by Christenberry and Godfree, and, if the Attorney General received notice in 1997, but did not appear in state court, Christenberry and Godfree did not timely remove the case to the District Court as the removal petition was not filed within thirty days of the Attorney General receiving notice of the lawsuit pursuant to 28 U.S.C. § 1447(d). App. 9-12. In a footnote, the Eleventh Circuit noted removal was not proper pursuant to 28 U.S.C. § 1446(b) as federal question jurisdiction was not created under 28 U.S.C. § 1331. App. 12, n.3.

REASONS FOR GRANTING THE PETITION

Drs. Christenberry and Godfree, contractors of a federally supported health center funded under § 330 of the Public Health Service Act, respectfully request the Court grant this Petition for Writ of Certiorari as the April 16, 2003 Opinion denies them the immunity to which they are entitled pursuant to the Federal Tort Claims Act. The District Court had proper jurisdiction over the claims alleged against Christenberry and Godfree as the Defendants timely delivered the summons and complaint served on them to their "immediate supervisor" or to "whomever was designated by the Secretary [of HHS] to receive such papers" as set out in 42 U.S.C. § 233(b). The state court action was removed more than 15 days after the Attorney General received notice of the lawsuit or should have received notice of the lawsuit in accordance with § 233(l)(1). If the Attorney General's first notice of the lawsuit was in November of 2001, then the Notice pursuant to 42 U.S.C. § 233(l)(1) filed by the Attorney General certified the Defendants in accordance with § 233(c) and the lawsuit was removable, whether it was by the Attorney General or by the Defendants. The Defendants further contend the November 20, 2001 decision of HHS which held they were not deemed employees of the Public Health Service constituted adverse agency action establishing federal question jurisdiction. Thus, the Defendants properly removed the case upon receipt of the November 20, 2001 letter from HHS which constituted "other paper" as contemplated in 28 U.S.C. § 1446(b). Finally, the Eleventh Circuit's Opinion creates a conflict within the Circuit as the Court has previously held 28 U.S.C. § 1446(b) does not apply to cases under the Westfall Act. *See, Green v. Hill*, 954 F.2d 694, 696 n.3 (11th Cir. 1992), *withdrawn in part*

and amended on petition for reh'g, 968 F.2d 1098 (11th Cir. 1992).

I. THE DISTRICT COURT PROPERLY HELD THE DEFENDANTS WERE INDEPENDENT CONTRACTORS COVERED BY THE CONTRACT WITH EQOL AND WERE ENTITLED TO THE PROTECTIONS AFFORDED UNDER 42 U.S.C. § 233(a).

Christenberry and Godfree seek the immunity afforded them pursuant to the Federal Tort Claims Act ("FTCA") as contract federal employees. In 1993, Congress extended FTCA protection to qualifying federally supported health centers. 42 U.S.C. § 233(g). A Public Health Service employee includes "an entity described in [§ 233(g)(4)], and any officer, governing board member, or employee of such entity, and any contractor of such an entity who is a physician or other licensed or certified health care practitioner (subject to paragraph 5)." 42 U.S.C. § 233(g)(1)(A). Paragraph (5) provides:

> an individual may be considered a contractor of an entity
>
> . . . only if . . .
>
> A) the individual normally performs on average of at least 32½ hours of service per week for the entity for the period of the contract. § 233(g)(5); or
>
> B) in the case of an individual who normally performs less than 32½ hours of service per week for the entity for the period of the contract, the individual is a licensed or certified provider of services in the fields of family practice, general

> internal medicine, general pediatrics, or obstetrics and gynecology.

42 U.S.C. § 233(g)(5).

The District Court found the Secretary of HHS erroneously concluded that the subject contract was between the P.C. and the EQOL. Instead, the District Court properly concluded that Christenberry and Godfree directly contracted with EQOL which afforded them the protection of the FTCA. The Eleventh Circuit's April 16, 2003 Opinion did not disturb that finding by the District Court.

II. THE DISTRICT COURT DID NOT ERR IN DENYING THE PLAINTIFF'S MOTION TO REMAND AND CONCLUDING THIS CASE WAS TIMELY REMOVED.

A. This Action Was Properly And Timely Removed Pursuant to 42 U.S.C. § 233.

1. Christenberry and Godfree complied with their requirements under § 233(b) and may not be denied the protection to which they are entitled under the FTCA.

The procedure for removal of a case from state to federal court in a lawsuit commenced against contractors of the Public Health Services is set out in 42 U.S.C. § 233. 42 U.S.C. § 233(b) provides:

> The Attorney General *shall defend* any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or his estate) for any such damage or

> injury.[4] Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

In order to comply with the notice provisions of § 233(b), Defendants seeking the protections afforded a federal employee are required to deliver a summons and complaint to their "immediate supervisor" or to "whomever was designated by the Secretary [of HHS] to receive such papers." In the instant action, the summonses and complaints served upon Christenberry and Godfree were delivered to Wayne Rowe, the individual at Etowah Quality of Life designated by the Secretary of HHS to receive such papers. It was not contested at the time Rowe provided the notice whether he was Christenberry and Godfree's "immediate supervisor." Section 233(b) required no further action on the part of Christenberry and Godfree.[5]

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[4] As noted by the District Court, the Attorney General has refused to defend Christenberry and Godfree.

[5] While the United States contested the issue of whether Christenberry and Godfree had complied with their requirements under § 233(b) in the District Court, it abandoned that argument on appeal. Moreover, if this Court concludes that even though Christenberry and Godfree

(Continued on following page)

Mr. Rowe, in turn, on July 1, 1997, made a demand on HHS to defend the claims filed against Drs. Christenberry and Godfree. Mr. Rowe received a response to that demand on July 17, 1997, from Elizabeth Jordan Gianturco from the Chief Litigation Branch of HHS. According to the response received from Ms. Gianturco, the request from Rowe was sent to the appropriate individual to receive such demands as she responded: "Before this office can request representation by the Department of Justice for the above captioned case, we must determine whether the health center and its personnel are covered under the Federal Tort Claims Act and were working within the scope of the grant and their employment with respect to the allegations." Thus, it was clear that Mr. Rowe's request was sent to an individual who was responsible for notifying the Attorney General that a claim had been filed against individuals referenced in 42 U.S.C. § 233(a). Further, Gianturco instructed Rowe to copy his response to the Department of Justice.

However, notwithstanding the action taken by Mr. Rowe, Christenberry and Godfree had complied with their requirements under § 233(b). As the action was removed more than fifteen days after the Attorney General either received notice or should have received notice about this

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complied with their requirements under the Act, jurisdiction was not invoked in the District Court because the Attorney General did not receive proper notice in 1997, this would clearly result in a denial of the Defendants' due process rights as well as a denial of the immunity available to them under the FTCA. Simply because others, responsible for providing notice to the Attorney General of the lawsuit under the Act, did not comply with their requirements, should not result in a denial to the Defendants of a defense to which they are legally entitled.

action, as required by § 233(l)(1), the Defendants were entitled to remove the case pursuant to § 233(l)(2). Sections 233(l)(1) and (2) provide:

> (1) If a civil action or proceeding is filed in a State court against any entity described in subsection (g)(4) of this section or any officer, governing board member, employee, or any contractor of such an entity for damages described in subsection (a) of this section, the Attorney General, within 15 days after being notified of such filing, shall make an appearance in such court and advise such court as to whether the Secretary has determined under subsections (g) and (h) of this section, that such entity, officer, governing board member, employee or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section with respect to the actions or omissions that are the subject of such civil action or proceeding. Such advice shall be deemed to satisfy the provisions of subsection (c) of this section that the Attorney General certify that an entity, officer, governing board member, employee, or contractor of the entity was acting within the line and scope of their employment or responsibility.
>
> (2) If the Attorney General fails to appear in State court within the time period prescribed under paragraph (1), upon petition of any entity or officer, governing board member, employee, or contractor of the entity named, the civil action or proceeding ***shall be removed to the appropriate United States District Court***. The civil action or proceeding shall be stayed in such court until such court conducts a hearing, and makes a determination, as to the appropriate forum or procedure for the assertion of the claim for damages described in subsection (a) of this section

> and issues an order consistent with such determination.

42 U.S.C. §§ 233(l)(1), (l)(2) (emphasis added).

The failure of the Attorney General to timely enter an appearance mandated that the action be removed to federal court. The Eleventh Circuit's April 16, 2003, Opinion cannot be allowed to stand as it is error to judicially graft a time limitation for a federal employee to remove a case to District Court. 28 U.S.C. § 1446(b) does not apply to this case because it was removed pursuant to the Westfall Act. It is clear that Congress intended the Westfall Act to be the exclusive basis for removal, and did not intend for the general removal statute to have any application to the specific removal provisions contained in 42 U.S.C. § 233(g)-(h), (l).

In correspondence dated April 17, 2003 to all counsel of record, the District Court raised the appropriate inquiry in asking what provision of 28 U.S.C. § 1446(b) triggers removal under the circumstances presented by the facts of this case. Drs. Christenberry and Godfree were served with a summons and complaint on June 17, 1997 and June 18, 1997, respectively. Drs. Christenberry and Godfree provided the summons and complaints to Wayne Rowe, the Chief Executive Officer of EQOL. As the District Court correctly noted in its April 30, 2002 Memorandum Opinion, this is all the statute required of the Defendants. On July 1, 1997, Mr. Rowe, in turn, made a written request of the Office of the General Counsel for HHS to move to dismiss the doctors as named defendants or to defend the lawsuit on behalf of Drs. Christenberry and Godfree. On July 17, 1997, Elizabeth Jordan Gianturco, Chief Litigation Branch, HHS, responded to Rowe's request. Which of these dates triggers the 30 days under § 1446(b) in which

the action could be timely removed by the Defendants? Was it June 17, 1997, the date the summons and complaints were provided to Mr. Rowe, the date Mr. Rowe alerted HHS, the date the Attorney General was notified of the lawsuit, or some other date which triggers the time for removal?

Section 1446(b) provides that the notice of removal must be filed within 30 days "after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . . " If § 1446(b) applies to claims brought under the Westfall Act, then the Defendants had until July 17, 1997 to remove the case to the District Court. As of July 17, 1997, HHS was still requesting information from Mr. Rowe in order to determine whether Drs. Christenberry and Godfree were to be deemed employees of HHS. In fact, as of November 20, 2001, according to the Notice filed by the United States Attorney, the Secretary of HHS still had "under consideration" whether Drs. Christenberry and Godfree were to be deemed employees of the Public Health Service.

Numerous practical problems are created by the Eleventh Circuit's conclusion that the time limitations contained in § 1446(b) apply to the removal procedures of the Westfall Act. All that is required of a defendant federal employee is that he/she deliver a copy of the summons and complaint served on him/her to the "immediate supervisor" or to "whomever was designated by the Secretary of HHS to receive such papers" as set out in 42 U.S.C. § 233(b). The federal employee then has no control over when his/her immediate supervisor furnishes copies of the pleadings and process to the United States attorney, to the Attorney General or to HHS. Thirty days could pass prior

to the time the supervisor alerts the Attorney General of the lawsuit against a federal employee, thus barring the federal employee's right to remove the case. A defendant, who is entitled the protections afforded under the FTCA, cannot know when the Attorney General has been notified of a lawsuit. Moreover, a federal employee has no control over the length of time it may take HHS to determine whether he/she is to be deemed a federal employee.

Additionally, the Eleventh Circuit provided no guidance on whether the Attorney General is also bound by the time limitations of § 1446(b). How can these time limitations comfortably coexist with the specific language of 28 U.S.C. § 2679(d)(2) which grants the Attorney General the right to remove a case at "any time before trial." It clearly was not the intent of Congress to allow the Attorney General the right to remove a claim against a federal employee at "any time before trial," and at the same time, limit the federal employees time to remove a case by the terms and provisions of the general removal statute.[6]

The Court's Opinion provides no guidance on how the removal provisions of the Westfall Act and the general removal statute can coexist. In fact, they cannot coexist as

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[6] In *Warren v. Joyner*, 996 F.Supp. 581, 584 n.3 (S.D.Miss. 1997), the United States waited until 17 months after the complaint had been filed to remove that case to federal court pursuant to 42 U.S.C. § 233(c). The Court specifically noted that while the "government's delay in removing this case seventeen months after it had been filed in state court is certainly not commendable, it is allowable pursuant to the plain language of the statute." *Id.* at 583. If Congress had intended there to be an outer time limitation in which a federal employee is entitled to remove a case, then clearly it would have been included in the Westfall Act.

the time limitations under § 1446(b) are inconsistent with the removal provisions of the Westfall Act.

2. The District Court properly held that the notice filed by the Attorney General with the state court mandated removal of this case to federal court.

However, even assuming the compliance by Christenberry and Godfree with § 233(b) did not result in proper notification to the Attorney General in 1997, the District Court properly concluded that the Notice Pursuant to 42 U.S.C. § 233(l)(1) filed by the Attorney General with the state court on November 20, 2001, triggered the removal provisions of § 233(c).

Although it is the position of the Defendants that the Attorney General received notice of this lawsuit in 1997, it is not disputed that the Attorney General, at the latest, received notice of the lawsuit on November 16, 2001. Within four days, the Attorney General filed a Notice pursuant to 42 U.S.C. § 233(l)(1) which advised in part:

> that the Secretary of the United States Department of Health and Human Services has under consideration, pursuant to the provisions of 42 U.S.C. §§ 233(g) and (h), whether Dr. Kyle Christenberry and Dr. Newton Godfree, both of whom are named defendants in the above-styled civil action, are to be deemed employees of the Public Health Service for purposes of 42 U.S.C. § 233(l)(1) with respect to the acts or omissions that are the subject of this civil action.

The notice concluded that Christenberry and Godfree: "may be deemed by the Secretary of Health and Human Services to be Public Health Service employees covered by

42 U.S.C. § 233(a) for acts and omissions that occurred in relation to the allegations of plaintiff's complaint."

Section 233(l)(1) required the Attorney General, within fifteen days of being notified of the lawsuit, to advise the state court as to whether the Secretary of HHS had determined that Christenberry and Godfree were employees of the Public Health Service with respect to the claims alleged by the Plaintiff. 42 U.S.C. § 233(l)(1). This notification by the Attorney General, in turn, "shall be deemed to satisfy the provisions of subsection (c) of this section that the Attorney General certify that ... [a] contractor of the entity was acting within the line and scope of their employment or responsibility." 42 U.S.C. § 233(l)(1). Because the Attorney General complied with the requirements of § 233(l)1) which certified the Defendants under § 233(c), that section mandated the removal of the case "any time before trial." 42 U.S.C. § 233(c). It was clear to Christenberry and Godfree that the Attorney General had no intention of complying with the mandate of § 233(c). Thus the Defendants effected the appropriate removal of the case to the District Court. As noted by the District Court: "Removal merely complies with that section whether instigated by the Attorney General or the defendants."[7]

[7] Defendants would note that in *Dedrick v. Youngblood*, 200 F.3d 744, 746 (11th Cir. 2000), the employee (similar to the action taken by Christenberry and Godfree) removed the action to federal court on the ground that he was a covered employee under § 233 of the FTCA.

B. Federal Question Jurisdiction Was Established When HHS Determined The Defendants Were Not Deemed Employees Of The Public Health Service.

28 U.S.C. § 1331, generally granting federal question jurisdiction, "confer[s] jurisdiction on federal courts to review agency action." *Califano v. Sanders*, 430 U.S. 99, 105 (1977), *see also Five Flags Pipe Line Co. v. Department of Transp.*, 854 F.2d 1438, 1439 (D.C.Cir. 1988) ("if Congress makes no specific choice of [the court in which judicial review is to occur] in the statute pursuant to which the agency action is taken, or in another statute applicable to it, then an aggrieved person may get 'non-statutory review' . . . in federal District Court pursuant to the general 'federal question' jurisdiction of that court"); *Owner-Operators Independent Drivers Association of America, Inc. v. Skinner*, 931 F.2d 582, 585 (9th Cir. 1991) (unless Congress specifically maps a judicial review path for an agency, review may be had in federal District Court under its general federal question jurisdiction). In *Califano*, the Supreme Court held:

> On October 21, 1976, Congress enacted Pub.L. 94-574 90 Stat. 2721, which amends 28 U.S.C. § 1331(a) to eliminate the requirement of a specified amount in controversy as a prerequisite to the maintenance of 'any (§ 1331) action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.' The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the [Administrative Procedure Act] of its own force may serve as a jurisdictional predicate.

> We conclude that this amendment now largely undercuts the APA as an independent jurisdictional provision.

Califano, 430 U.S. at 105. The Defendants have suffered adverse agency action which effectively denies them immunity in this case. Federal question jurisdiction pursuant to § 1331 was established by the HHS's incorrect decision which was sent via facsimile to counsel for the Defendants on November 20, 2001.

The Eleventh Circuit previously recognized the importance of addressing the immunity issue in *Flohr v. Mackovjak*, 84 F.3d 386 (11th Cir. 1996). In that case, the complaint was removed by the defendant's private attorney on the grounds the defendant was an Air Force officer and removal was proper pursuant to 28 U.S.C. § 1442(a)(1). The plaintiff correctly argued the defendant was not an officer and moved to remand the case. The defendant then "eventually performed the acts necessary to be represented by the United States" on the grounds that he might be covered by the FTCA. The United States moved to be substituted as the party defendant, and the United States Attorney certified the defendant was acting "within the scope of his office or employment at the time of the incident out of which the claim arose." *Id.* at 389. The plaintiff moved to strike the certification on the grounds the defendant was not acting within the scope of this employment, and asked the court to deny the motion to substitute. The District Court struck the certificate, denied the motion to substitute and ordered the case remanded to the state court. The defendant then appealed the denial of the motion to substitute and the remand order, and filed a petition for writ of mandamus with this Court. The petition was denied without prejudice pending the appeal. *Id.* at 389, n.6.

The Court initially addressed the question of whether it had jurisdiction over the appeal. In holding it had jurisdiction, the Court stated:

> The remedy provided by the Federal Tort Claims Act to a plaintiff for injury arising from the negligence of a federal employee acting within the scope of his employment is 'exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim.' This means that if the United States is substituted in this action, Mackovjak will be immune from any other civil action by the plaintiffs arising from the accident. Refusing to substitute the United States as a defendant is thus equivalent to denying immunity to the federal employee. Orders denying absolute or qualified immunity are embraced within the collateral order doctrine of *Cohen [v. Beneficial Indus. Loan Corp.]*. Likewise, Mackovjak must be able to have this court review an order that effectively forces him to defend this claim in state court when it is possible that the claim is precluded by the Federal Tort Claims Act. We therefore take jurisdiction of the appeal of the denial of substitution and proceed to review the District Court's decision. (citations omitted).

Id. at 390.

In the instant action, this decision is equally applicable to the removal proceedings and the Defendants' position that the decision of the HHS was reviewable by the District Court. If the District Court's order in *Mackovjak* was not reviewable, then the District Court was the sole decision-maker as to the denial of immunity to the defendant in that case. The Eleventh Circuit concluded the District Court did not have the power to effectively deny

immunity to a possible federal employee without an opportunity to that employee for judicial review. Likewise, certainly HHS does not have exclusive power to deny Christenberry and Godfree, federal employees, their right to immunity.

C. The Defendants Properly And Timely Removed This Case Pursuant to 28 U.S.C. § 1446(b).

Finally, not only was there appropriate basis for removal as determined by the District Court, another basis for removal existed. The November 20, 2001 letter from the Secretary of HHS which effectively denied immunity to Christenberry and Godfree constituted "other paper" within the meaning of § 1446(b). "Other paper" includes papers that are filed in the case as well as a transcript of a deposition, *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996); answers to interrogatories, *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 164 (5th Cir. 1992); correspondence between attorneys, *Stramel v. GE Capital Small Business Finance Corp.*, 955 F.Supp. 65 (E.D.Tex. 1997); *see also Jackson v. Mississippi Farm Bureau Mut. Ins. Co.*, 947 F.Supp. 252, 254 (S.D.Miss. 1996); and answers to requests for admissions, *Johnson v. Dillard Department Stores, Inc.*, 836 F.Supp. 390, 391 (N.D.Tex. 1993). As the Defendants timely removed this case within 30 days of the receipt of the November 20, 2001 decision, jurisdiction was proper with the District Court.

D. The April 16, 2003 Opinion Creates A Conflict In The Eleventh Circuit As It Had Previously Determined That Section 1446(b) Did Not Apply To Claims Brought Under The Westfall Act.

In *Green v. Hill*, 954 F.2d 694, 696 n.3 (11th Cir. 1992), *withdrawn in part and amended on petition for reh'g*, 968 F.2d 1098 (11th Cir. 1992), Green filed suit in state court against Hill and others alleging assault and battery, failure to provide reasonably safe working conditions and a claim for general relief under the FTCA. The Attorney General certified the defendants were acting within the scope of their employment and the suit was removed to federal court. The United States was substituted for the individual defendants who were dismissed from the case. The District Court dismissed the lawsuit for lack of subject matter jurisdiction.

One of the issues on appeal was whether the removal was timely. This Court held:

> We also note that Green's contention that the removal was improper because it was technically untimely under 28 U.S.C. § 1446(b) is meritless. The Westfall Act provides that upon certification that an employee was acting in the scope of employment, the action shall be removed 'at any time before trial.' 28 U.S.C. § 2679(d)(2).

954 F.2d at 696, n.3. Other Courts have recognized that the Eleventh Circuit has held that § 1446(b) does not apply to cases under the Westfall Act. *See*, *Anthony v. Runyon*, 76 F.3d 210, 214 (8th Cir. 1996).

As § 1446(b) clearly conflicts with the provisions of the Westfall Act, its time limitations did not bar Drs. Christenberry and Godfree from removing this case to the District Court.

III. HHS HAS DEEMED DRS. CHRISTENBERRY AND GODFREE FEDERAL EMPLOYEES.

In June 1996, the Secretary of HHS deemed Drs. Christenbery and Godfree to be federal employees. According to a declaration filed by the United States with the District Court, EQOL was deemed a federally funded community health center. That declaration provides the following testimony: "The organization, as well as certain persons affiliated with it, are deemed employees of the federal government and receive coverage under the Federal Tort Claims Act." EQOL sought and received deeming status for a list of employees which included as of May 20, 1996, Drs. Christenberry and Godfree. Marilyn H. Gaston, M.D. the Assistant Surgeon General, wrote Wayne Rowe on June 21, 1996, and advised that EQOL, its "officers, governing board members, employees and contractors who are physicians or other licensed or certified health care practitioners . . . " were deemed to be employees of the Federal Government effective June 23, 1996. This was prior to the alleged negligence made the basis of this lawsuit.

HHS has now reversed its prior decision which deemed Drs. Christenberry and Godfree to be federal employees. The Defendants removed the case to the District Court and, on the same date, requested that it conduct a de novo review of HHS's failure and refusal to deem these individuals employees of the Federal Government. The reversal by HHS of its prior determination that Drs. Christenberry and Godfree are deemed federal employees denies them the protections afforded by the FTCA, and such refusal is reviewable by a District Court as is the Attorney General's scope of employment certification. 42 U.S.C. § 233(g) provides that the June 21, 1996 determination by HHS "shall be final and binding" on

parties to a civil action or proceeding. HHS cannot reverse its final and binding June 21, 1996 determination.

Just as this Court has held the scope-of-employment certification is reviewable by a District Court, the decision of HHS and the United States Attorney's Notice Filed Pursuant to 42 U.S.C. § 233(l)(1) with the Circuit Court of Etowah County, Alabama is reviewable by the District Court. If the actions of HHS and the United States Attorney in this case are not reviewable, then these entities act as the sole judges of which cases will be defended by the United States, and which cases, for whatever reason, the United States will fail and refuse to defend under the FTCA.

The importance of review by a District Court of FTCA protection was discussed in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). In *Lamagno*, the plaintiff brought suit against a federal employee in District Court. The United States Attorney certified the employee was acting within the scope of his employment. However, the United States was not substituted as the defendant as it would have resulted in a dismissal of the lawsuit because the plaintiff's claim fell within an exception to the FTCA's waiver of sovereign immunity. The plaintiff sought judicial review of the Attorney General's scope-of-employment certification.

The Supreme Court in holding the Attorney General's scope-of-employment certification was reviewable noted the practical problems if judicial review was not allowed:

> In sum, under [the federal employee's] reading of the congressional product at issue, whenever the case falls within an exception to the FTCA, the Attorney General sits as an unreviewable 'judge in her own cause'; she can block petitioner's way to a tort action in court, at no cost to the federal treasury, while avoiding litigation in which the

> United States has no incentive to engage, and incidentally enhancing the morale 'or at least sparing the purse' of federal employees. . . .
>
> If Congress made the Attorney General's delegate, sole judge, despite the apparent conflict of interest, then Congress correspondingly assigned to the federal court only rubber-stamp work. Upon certification in a case such as this one, the United States would automatically become the defendant and, just as automatically, the case would be dismissed. The key question presented "scope of employment" however contestable in fact, would receive no judicial audience. The court could do no more, and no less, than convert the executive's scarcely disinterested decision into a court judgment. This strange course becomes all the more surreal when one adds to the scene the absence of an obligation on the part of the Attorney General's delegate to conduct a fair proceeding, indeed, any proceeding. She need not give the plaintiff an opportunity to speak to the 'scope' question, or even notice that she is considering the question. Nor need she give an explanation for her action.

Id. at 429.

Just as the Supreme Court has held the scope-of-employment certification is reviewable by a District Court, the decision of HHS and the United States Attorney's Notice Filed Pursuant to 42 U.S.C. § 233(l)(1) with the Circuit Court of Etowah County, Alabama is reviewable by the District Court. If the actions of HHS and the United States Attorney in this case are not reviewable, then these entities act as the sole judges of which cases will be defended by the United States, and which cases, for whatever reason, the United States will fail and refuse to defend under the FTCA.

The Eleventh Circuit's Opinion, which holds that 28 U.S.C. § 1446(b) applies to the Westfall Act renders any agency decision adverse to a federal employee unreviewable by a District Court as HHS and the United States Attorney, after receiving notice of a lawsuit, could simply not respond to a request for a defense made by a federal employee. If the Opinion is allowed to stand, then it would empower the United States Attorney to simply enter an appearance in the state court action, as in this case, advise the state court it was considering the request made by the federal employee, and allow 31 days to pass, thus, precluding federal court review of the agency decision. This denies due process to federal employees, like Drs. Christenberry and Godfree, of the immunity to which they are entitled under the FTCA.

CONCLUSION

For the foregoing reasons, Drs. Christenberry and Godfree respectfully request that this Court grant the Petition for Writ of Certiorari, and hold the District Court's Order which held this action was properly and timely removed to the United States District Court for the Northern District of Alabama is due to be affirmed.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-13283

D. C. Docket No. 01-02992-CV-PT-M

KATHY ALLEN,
individually and as mother and
next friend of her baby son who
suffered intrauterine death at
35 weeks of gestation, whose
name as used in this complaint
will be Dakota Allen,

Plaintiff-Appellant,

versus

KYLE P. CHRISTENBERRY, Dr.,
W. NEWTON GODFREE, Dr.,
QHG OF GADSDEN INC.,
d.b.a. Gadsden Regional Medical Center,
EMCARE, INC.,
VERNON JOHNSON, M.D.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed April 16, 2003)

Before CARNES, HULL and ALARCON*, Circuit Judges.

CARNES, Circuit Judge:

This appeal stems from a medical malpractice lawsuit filed in state court by Kathy Allen against Dr. Kyle Christenberry and Dr. W. Newton Godfree. The defendant doctors removed the case to federal court ten days before the trial in state court was scheduled to begin, on the asserted ground that they were federal employees under the Federally Supported Health Centers Assistance Act of 1995 (FSHCAA), Pub. L. No. 104-73, 109 Stat. 777 (1995) (codified at 42 U.S.C. § 233). Allen moved the federal district court to remand the case to state court, but it denied her motion, concluding that the defendant doctors had properly removed the case and that they were entitled to the protections of 42 U.S.C. § 233(a). We disagree, because the FSHCAA provides specific prerequisites for removal of a case under its provisions, and they were not met in this case. For that reason, we will reverse the judgment of the district court and instruct it to remand the case to state court.

I.

During her pregnancy in 1996, Kathy Allen received prenatal care from Etowah Quality of Life, Inc. ("the Etowah Center"), a federally funded community health center. The Etowah Center has been deemed by the Department of Health and Human Services (HHS), in accordance with the FSHCAA, to be eligible for coverage

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* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

under the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. § 1346(b)(1); 42 U.S.C. § 233(a), (g)(1)(A). Approximately 34 to 35 weeks into her pregnancy, Allen was diagnosed with premature rupture of the fetal membranes and received care from Drs. Christenberry and Godfree at Gadsden Regional Medical Center. They provided services to her under a contract with the Etowah Center.[1] After that treatment, an ultrasound test revealed that the baby had died in utero.

Allen filed a medical malpractice action against Drs. Christenberry and Godfree and several other defendants on June 6, 1997, in state court in Etowah County, Alabama. The defendant doctors moved to dismiss the case on the ground that the state court did not have jurisdiction over the claims against them because they were federal employees whose actions in providing care and treatment to Allen were covered by the FTCA. The state court denied their motion on January 16, 1998, and discovery in the case proceeded. On April 24, 2001, the state court set a trial date of November 26, 2001.

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[1] The parties dispute whether the contract was between the Etowah Center and Drs. Christenberry and Godfree as individuals or between the Etowah Center and the professional corporation for which they work. Only if the contract was with the two doctors as individuals can they be deemed employees of the Public Health Service under 42 U.S.C. § 233(g)(1)(A). *See Dedrick v. Youngblood,* 200 F.3d 744, 746 (11th Cir.2000) (holding §§ 233(g)(1)(A) and (g)(5) require a contractor be an individual who contracts directly with an eligible entity instead of through his employer). We need not resolve this dispute, because we conclude that even if the contract was with the two doctors as individuals, the case was not properly removed from state court under the FSHCAA.

Drs. Christenberry and Godfree made some early ineffective attempts to have HHS or the Department of Justice defend the suit. On July 1, 1997, Wayne Rowe, the chief executive officer of the Etowah Center, forwarded Allen's complaint to the Office of the General Counsel of HHS and requested that it move to dismiss the two doctors as named defendants or otherwise defend the suit on their behalf. On July 17, 1997, Elizabeth Gianturco, the chief of HHS's Litigation Branch, requested additional information from Rowe and asked that he also send the information to Roger Einerson in the Torts Branch of the Department of Justice. Gianturco advised Rowe that before it could request that the Department of Justice represent the defendant doctors, HHS needed to determine whether the doctors were covered under the FTCA and were working within the scope of their employment. On August 4, 1997, Rowe sent the requested documentation to Gianturco and indicated a copy to Einerson. Several months later, on November 12, 1997, counsel for the defendant doctors sent a letter to the FTCA Coordinator of the Public Health Service (PHS) and enclosed a copy of the complaint, their motion to dismiss, and Allen's response to the motion to dismiss. The record does not contain evidence of any other contact or attempted contact between the two doctors and HHS, or between them and the Department of Justice, during the four year period from November 12, 1997 to November 16, 2001.

On November 16, 2001, over four years from the date of the last letter to PHS on behalf of Drs. Christenberry and Godfree, and only ten days from the scheduled start date of the trial in state court, the two doctors sent a letter to Jeffrey Axelrad, Director of the Torts Branch at the Department of Justice. They requested that the Attorney

General certify that they were acting within the scope of their federal employment at the Etowah Center when Allen's malpractice claim arose and move to substitute the United States as a defendant under the FTCA.

On November 20, 2001, the United States, acting through the United States Attorney for the Northern District of Alabama, filed a "Notice Pursuant to 42 U.S.C. § 233(l)(1)" in state court. The notice stated that the Attorney General had been notified for the first time of the lawsuit on November 16, 2001, and it "advise[d] this Honorable Court that the Secretary of the United States Department of Health and Human Services ha[d] under consideration" whether Drs. Christenberry and Godfree were to be deemed employees of PHS under 42 U.S.C. § 233(l)(1). The notice acknowledged the possibility that they "may be deemed" employees covered by 42 U.S.C. § 233(a). Also on November 20, 2001, HHS informed the two doctors that they were not going to be deemed employees of PHS and that decision was final and binding upon the Attorney General and the parties in the lawsuit.

Notwithstanding the letter from HHS, Drs. Christenberry and Godfree removed the case to federal district court on November 21, 2001. They based that removal on several statutes, including 42 U.S.C. § 233, 28 U.S.C. § 1331, and 28 U.S.C. § 1446(b). On the same day as the removal, they also filed in the district court a "Motion for De Novo Determination of Status of Defendants as Employees of Public Health Service." Allen moved, on November 27, 2001, to remand the case to state court.

The district court denied Allen's motion to remand, because it concluded that Drs. Christenberry and Godfree had given timely notice of the suit to their immediate

superior, Wayne Rowe, as required by the FSHCAA, and in the district court's view they were contractors entitled to the protections of 42 U.S.C. § 233(a). The court concluded that "[t]he action has been timely removed by the defendants or, by operation of law, has been or should have been removed by the Attorney General." To permit interlocutory review of its decision, the district court entered an order stating that its decision involved a controlling issue of law as to which there is a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation. Based upon that certification, Allen filed a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), which we granted.

II.

We begin our consideration of 42 U.S.C. § 233(a) with the recognition that removal statutes should be construed narrowly, with doubts resolved against removal. *Diaz v. Sheppard,* 85 F.3d 1502, 1505 (11th Cir. 1996) (citing *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 107-09, 61 S. Ct. 868, 872, 85 L.Ed. 1214 (1941)). The FSHCAA provides authority to remove cases to federal court only in specific and limited circumstances. Because those circumstances were not present in this case, Drs. Christenberry and Godfree did not properly remove this action to federal court.

The FSHCAA makes the remedy provided against the United States under the FTCA the exclusive remedy for the medical malpractice of employees or contractors of

PHS.[2] 42 U.S.C. § 233(a). In order to be covered under the FTCA, an entity, an employee of the entity, or a contractor of the entity seeking coverage must be deemed an employee of PHS. 42 U.S.C. § 233(g)(1)(A). Drs. Christenberry and Godfree claim that they are contractors of the Etowah Center, a federally supported health center which itself is deemed an employee of PHS, and for that reason they should be deemed employees of PHS and entitled to the protections of the FTCA.

Section 233(b) provides that the Attorney General "shall defend any civil action" brought in court against any officer or employee of PHS acting in the scope of his employment. 42 U.S.C. § 233(b). The Attorney General may remove a case under § 233(c) this way:

> Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United

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[2] 42 U.S.C. § 233(a) provides:

> The remedy against the United States provided by section[ ] 1346(b) . . . for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

> States of the district and division embracing the place wherein it is pending. . . .

Id. § 233(c).

Section 233(l)(1) provides that if a civil action is filed in state court against an eligible entity or an employee or contractor of the entity, "the Attorney General, within 15 days after being notified of such filing, shall make an appearance in such court and advise such court" whether the Secretary of HHS has determined that the entity, employee, or contractor is "deemed to be an employee of the Public Health Service for purposes of this section. . . ." *Id.* § 233(l)(1). If he advises the court that HHS has determined that the employee is deemed an employee of PHS – which also amounts to a certification that the employee was acting within the scope of employment – the Attorney General must remove the case to federal court. *Id.* § 233(c), (l)(1).

If the Attorney General does not make an appearance within 15 days, § 233(l)(2) provides that the entity, employee, or contractor can remove the case to district court. *Id.* § 233(l)(2). If that happens, the case is stayed until the district court conducts a hearing and makes a determination as to the appropriate forum for assertion of the claim. *Id.*

In this case, the Attorney General did appear in the state court proceeding within 15 days of being notified of the lawsuit, but he did not advise the court of any determination by HHS, because none had been made as of that time. HHS did make a determination, deciding that Drs. Christenberry and Godfree were not deemed employees of PHS, and it was that determination which prompted the two doctors to remove the case to federal court.

The reason the removal by Drs. Christenberry and Godfree was improper is that the statute authorizes removal in only two circumstances, and neither occurred here. If the Attorney General had notified the court that HHS had determined that the doctors were deemed employees of PHS, effectively certifying that they had been acting within the scope of their employment with it, removal would have been proper (indeed mandatory). 42 U.S.C. § 233(c), (l)(1). But that did not happen.

The "Notice Pursuant to 42 U.S.C. § 233(l)(1)" that the United States Attorney filed on November 20, 2001, four days after the Attorney General had been notified of the lawsuit, did not advise the court that HHS deemed Drs. Christenberry and Godfree employees of PHS for purposes of the lawsuit. Instead, the notice stated that the Secretary of HHS was still considering whether to deem them employees of PHS. It noted that in the future they "may" be deemed PHS employees, which also meant, of course, that they might not be. The notice communicated to the court that it was possible they would be deemed PHS employees, but no decision had been made as of that date. The statute does not provide for removal upon notification that no decision has been reached yet. Even if it did, the defendant doctors could not have removed the case under § 233(c), because that section provides for removal by the Attorney General, not by the defendants.

If the Attorney General had failed to appear in state court within 15 days of being notified of the suit, Drs. Christenberry and Godfree could have removed the case to federal court themselves. *Id.* § 233(l)(2). But that did not happen, either. The Attorney General did appear through the United States Attorney within four days of being notified on November 16, 2001, to give notice that no

decision had been made but one was forthcoming. The next day after the Attorney General appeared the defendant doctors themselves removed the case to federal court, something the statute does not permit.

Drs. Christenberry and Godfree argue that the Attorney General actually had received notice of the lawsuit by way of their letters to HHS in 1997, which was four years before they removed the case to federal court (which happened just days before the scheduled start of the state trial). Four years is certainly longer than 15 days, but it is too long to do the doctors any good. Section 233(l)(2) itself does not specify a time limit for removal just as it does not specify which district court is the "appropriate United States district court" for removal. *See* 42 U.S.C. § 233(l)(2). Those matters are left to the general removal statute, which is 28 U.S.C. § 1446(b). *See generally, Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 129, 116 S. Ct. 494, 497 (1995) (applying both 28 U.S.C. § 1447(d), which is the general statute governing appellate review of remand orders, and 28 U.S.C. § 1452, which governs removals and remand orders in bankruptcy proceedings, to determine whether district court's remand order was reviewable and noting there is no reason the two statutes "cannot comfortably coexist"); *Lazuka v. FDIC,* 931 F.2d 1530, 1536 (11th Cir. 1991) (holding the limitation period in 28 U.S.C. § 1446(b) applied to removal by FDIC under 28 U.S.C. § 1819 because § 1819 did not have a separate procedure). If the Attorney General was notified in 1997, as Drs. Christenberry and Godfree contend, they had thirty days from that notification in which to remove this case. They did not do so.

We also conclude that HHS's determination, which came a day before the removal, that Drs. Christenberry

and Godfree were not to be deemed employees did not create federal question jurisdiction under 28 U.S.C. § 1331. They base their argument to the contrary on our decision in *Flohr v. Mackovjak,* 84 F.3d 386 (11th Cir. 1996), which does not support their position. *Flohr* involved the collateral order doctrine and a question of appellate jurisdiction. We held only that we had jurisdiction to review the district court's denial of the United States' motion to substitute itself as defendant, because denying the motion to substitute effectively denied immunity to the defendant – a civilian employee of the United States Army. *Id.* at 390. The lawsuit in *Flohr* was already properly in federal court under 28 U.S.C. § 1442(a)(1) because the defendant indisputably was a federal employee. Section 1442 does not require a prior determination of the defendant's employment status by the Executive Branch or an appearance by the Attorney General for proper removal in those circumstances; instead, it allows removal of a civil action commenced in a state court against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office" by that defendant. 28 U.S.C. § 1442(a)(1).

In contrast, in the FSHCAA Congress left the determination of the defendants' employment status to the Secretary of HHS and predicated removal upon either an affirmative deeming by the Secretary or the Attorney General's failure to appear and advise the court within a prescribed period of time. *See* 42 U.S.C. § 233(g)-(h), (l).

Neither occurred in this case, and we may not rewrite the statute.[3]

III.

Because the district court erred in denying Allen's motion to remand, its order denying remand is REVERSED and the case is REMANDED with instructions to remand this case to state court.

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[3] We also reject Drs. Christenberry and Godfree's argument that they properly removed this case pursuant to 28 U.S.C. § 1446(b). Generally, a defendant can only remove a case to federal court within 30 days after receiving the pleading. 28 U.S.C. § 1446(b). But, § 1446(b) provides, "If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." The defendant doctors contend that the November 20, 2001 letter from HHS informing them that they were not deemed employees of PHS constituted "other paper" within the meaning of § 1446(b). However, this argument necessarily depends on the proposition HHS's determination that they were not PHS employees created federal question jurisdiction under § 1331. Section 1446 does not separately provide jurisdiction. Because HHS's determination did not create federal question jurisdiction, removal under § 1446 was improper.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

KATHY ALLEN, ETC., Plaintiff,	)	
v.	)	Case No.: CV-01-PT-2992-M
KYLE CHRISTENBERRY, ET AL., Defendants.	)	

MEMORANDUM OPINION

(Filed Apr. 30, 2002)

This cause comes to be heard upon plaintiff Kathy Allen's Motion to Remand filed on November 27, 2001.

FACTS AND PROCEDURAL HISTORY

On May 20, 1996, Drs. Larry Grimes, W. Newton Godfree, James Phillips, and Kyle Christenberry, d/b/a Drs. Grimes & Godfree, P.C., (sic) entered into a contract as "independent contractors" with Etowah Quality of Life ("EQOL")[1] to provide in-hospital gynecological

[1] The EQOL is an Alabama not-for-profit corporation with its principal place of business in Etowah County, Alabama. EQOL is a federally supported health center funded under § 330 of the Public Health Services Act. Apparently there is no dispute that EQOL is a qualified "entity" under 42 U.S.C. § 233(g)(4).

and obstetrical services to EQOL's patients.[2] The purported contractors contracted to provide these services at the various hospitals, clinics, offices, and institutions served by the EQOL.[3]

Kathy Allen ("Allen") became pregnant in 1996. During her pregnancy, Dr. Kyle Christenberry ("Christenberry")

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[2] The contract was executed by Dr. Larry Grimes on behalf of "Drs. Grimes, Godfree, Phillips, Christenberry" and by Wayne Rowe on behalf of Etowah Quality of Life, Inc. The contract was not signed on behalf of the P.C. *See* 42 U.S.C. § 233(g)(1)(A). The pertinent statute apparently does not provide authority to contract with the P.C. It was signed on behalf of the individual physicians as independent contractors. For a full discussion of the pertinent contract terms, see this court's order filed January 4, 2002. On May 31, 1996, the shareholders of Drs. Grimes & Godfree, P.C., amended the Articles of Incorporation to change the corporation's name to Women's Healthcare Professionals, P.C. The fact that the individual contractors may have been paid through the P.C. is not controlling. The contract controls.

[3] Drs. Christenberry and Godfree did not personally sign or initial the contract. It appears that they have ratified the contract, individually, through performing services under it. There are only three possibilities: (1) there was no contract between EQOL and anyone; (2) there was a contract between EQOL and the P.C.; or (3) there was a contract between EQOL and the individual physicians. While the contract was inartfully drafted, the most likely conclusion is that there is a contract with the individual physicians either by virtue of the contract being signed by the agent of the individual physicians or, in any event, by ratification by the individual physicians. The court further notes that in EQOL's 1996 application Christenberry and Godfree were listed as "employees." On June 21, 1996, the HHS stated in a determination letter that:

> This 'FTCA coverage' is applicable to deemed entities and their (sic) including officers, governing board members, employees, and contractors who are physicians or other licensed or certified health care practitioners working full-time (minimum 32.5 hours per week) or part-time providing family practice, general internal medicine, general pediatrics, or obstetrical/gynecological services.

and Dr. W. Newton Godfree ("Godfree") (defendants) were her obstetricians.[4] All services provided by Christenberry and Godfree to Allen were rendered pursuant to the contract entered into with EQOL.[5]

On June 6, 1997, Allen filed a medical malpractice action against Christenberry, Godfree, EmCare, Inc. ("EmCare"),[6] Dr. Vernon Johnson,[7] and QHC of Gadsden, Inc. ("QHC"), d/b/a Gadsden Regional Medical Center in the Circuit Court of Etowah County, Alabama. Dr. Christenberry was served with a copy of the summons and complaint on June 17, 1997. Dr. Godfree was served with a copy of the summons and complaint on June 18, 1997.

Wayne Rowe ("Rowe"), Chief Executive Officer of EQOL, was notified of this civil action.[8] On July 1, 1997,

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[4] Drs. Christenberry and Godfree provided on call services for EQOL. Allen was being followed during her pregnancy by Dr. Vickie Griffin. Drs. Christenberry and Godfree received a call from Allen and cared for her while she was an inpatient at Gadsden Regional Medical Center ("GRMC") during the time period of November 21, 1996 to November 23, 1996. After she was discharged, her care was resumed by Dr. Griffin.

[5] Drs. Christenberry and Godfree did not charge anything for the services they provided Allen apart from the compensation which was received under the contract with EQOL. Pursuant to the terms of the contract, EQOL was billed monthly for the services rendered by the contractors.

[6] EmCare is the corporation that provided physicians to practice in GRMC's emergency room.

[7] According to the allegations in the complaint, Dr. Johnson was employed at GRMC and was serving in that capacity in the emergency room on November 24, 1996.

[8] It is not clear from the record who notified Rowe. The defendants and the Government dispute whether Rowe was the defendants'

(Continued on following page)

Rowe made a written request of the Office of the General Counsel for the Department of Health and Human Services ("HHS") to move to dismiss the doctors as named defendant or to defend the lawsuit on behalf of Drs. Christenberry and Godfree.[9] *See* Exhibit 1. In his letter, Rowe explained that "Drs. Christenberry and Godfree provide on-call delivery coverage to Quality of Life Health Services, Inc. patients via a contractual arrangement with Women's Health Care, a privately owned facility." Rowe attached a "subpoena" (sic) that indicated that Drs. Christenberry and Godfree were defendants in the medical malpractice action.[10] He also enclosed a copy of the contract executed by EQOL and the doctors.

On July 17, 1997, Elizabeth Jordan Gianturco, Chief Litigation Branch, HHS, responded to Rowe's request as follows:

"immediate superior" for notification purposes. *See* 42 U.S.C. § 233(b). The defendants contend that Rowe was the person designated by the Secretary of HHS to receive complaints against EQOL and/or its contractors. They also contend that Rowe was the person designated by HHS to forward any such complaints to HHS. In support of these contentions, defendants submit the affidavit of Yvonne George, Risk Manager for EQOL. In contrast, the Government contends that the defendants do not have an "immediate superior" under 42 U.S.C. § 233(b) because they are not commissioned officers, employees or contractors of the Public Health Service. The latter argument is circular.

[9] Rowe sent the request to the Office of General Counsel, Business and Administrative Law Division, Chief Litigation Branch, c/o Ms. Phyllis Hastings.

[10] Apparently he attached a copy of the summons and complaint rather than a "subpoena."

Before this office can request representation by the Department of Justice for the above captioned case, we must determine whether the health center and its personnel are covered under the Federal Tort Claims Act and were working within the scope of the grant and their employment with respect to the allegations. We will need the following additional information as quickly as possible. The information provided should pertain to the date of the alleged incident which in this case appears to be November 23, 1996.

1. A copy of your center's deeming letter.

2. Copies of *a valid medical license or certificate* which was in effect at the time of the alleged negligence *for each individual practitioner involved.*

3. A statement from you or someone in authority that the practitioner was not billing privately for services to any center patients.

4. A copy of all of the plaintiff's medical records from the health center and any private facility that might be involved.

5. A copy of all insurance policies providing coverage of any type to the health center and the involved individuals.

6. A narrative statement regarding the facts of the alleged incident by the practitioner, the medical director or someone familiar with the events.

Please send a copy of all the documents that you send to us to:

Roger Einerson
Torts Branch
Civil Division
Department of Justice
Post Office Box 898
Ben Franklin Station
Washington, D.C. 20044

See Exhibit 2 (emphasis added).

On August 4, 1997, Rowe responded to Ms. Gianturco's request.[11] Rowe enclosed the following documents in his response: 1) the EQOL's deeming letter; 2) copies of Christenberry and Godfree's medical licenses; 3) a statement regarding billing records; 4) Allen's medical records; 5) Christenberry and Godfree's malpractice insurance policy; and 6) Christenberry and Godfree's narratives regarding the alleged incident. *See* Exhibit 3.

According to Rowe, the United States failed or refused to defend the action or to cause it to be defended. Apparently, it took *no* action in response to the letters of July 17, 1997 and August 4, 1997.

On November 12, 1997, counsel for Drs. Christenberry and Godfree wrote the FTCA Coordinator for the Public Health Service as follows:

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[11] Rowe's letter was addressed to the Chief Litigation Branch, c/o Elizabeth Jordan Gianturco, Business and Administrative Law Division, Office of General Counsel, Room 5362, Cohen Building, 330 Independence Avenue, S.W., Washington, D.C. 20201. By stamped notation on the letter, the requested documents were said to have been received on August 11, 1997. It is not clear whether copies were sent to Einerson. It should be noted that no position was taken at the time that Rowe was not the "immediate superior."

This follows our telephone conference November 12, 1997. We are defending Dr. W. Newton Godfree and Dr. Kyle P. Christenberry obstetricians practicing in Gadsden, Alabama.

Enclosed are copies of the following items:

1. Complaint filed by Kathy Allen in the Circuit Court of Etowah County, Alabama, Civil Action No. CV-97-974-RSM.

2. Motion to dismiss filed for defendants, W. Newton Godree, M.D., and Kyle P. Christenberry M.R.

3. Plaintiff's response to motion to dismiss filed by Mr. Douglas Burns, attorney for plaintiff.

4. Plaintiff's supplemental response to motion to dismiss filed by Mr. John S. Morgan, also an attorney with the law firm representing the plaintiff.

I have received and thank you for Standard Form 95.

Thank you very much for your attention in this matter.[12]

See Exhibit 4.

Drs. Christenberry and Godfree filed the motion to dismiss in state court. The basis of the motion was that

[12] Counsel for the defendants, Robert E. Parsons, addressed the letter to Ms. Eve Berzins, FTCA Coordinator, SFO, Public Health Service. HRSA/Southeast Field Office, Health Professional Branch, 101 Marietta Towers, Suite 1209, Atlanta, GA 30323.

Circuit Court of Etowah County, Alabama did not have subject matter jurisdiction over the action because Christenberry and Godfree were employees of the Federal Government. The defendants claimed that the state court did not have subject matter jurisdiction because their actions in their capacities as doctors for EQOL were covered under the Federal Tort Claims Act. By order dated January 16, 1998, Judge Roy Moore denied the defendants' motion to dismiss. Thereafter, the defendants filed an answer to Allen's complaint asserting that they were immune from the claims alleged in the complaint.

By order dated April 24, 2001, Allen's medical malpractice lawsuit was set first on the Etowah County Circuit Court trial docket for November 26, 2001. On November 16, 2001, counsel for Drs. Christenberry and Godfree wrote a letter to Jeffrey Axelrad of the Department of Justice seeking a determination as to the employment status of Drs. Christenberry and Godfree.[13] That letter stated as follows:

> This firm represents Drs. Christenberry and Godfree in a civil action brought by Kathy Allen, a mother of deceased infant, Dakota Allen. A copy of the complaint is enclosed. Both of my clients were working as contractors with the

[13] The court does not decide, but it would appear that Drs. Christenberry and Godfree are being represented by attorneys provided by their malpractice insurance carriers. In view of Title 42 U.S.C. § 233(g)(1)(H)(2), the ultimate liability for damages, if any, may lie with such carrier in any event. Further, there may be an issue as to whether, if they have malpractice insurance which covers them, they have coverage under 42 U.S.C. § 233.

Quality of Life Health Services, Inc., a federally-supported health center funded under Section 330 of the Public Health Service Act. Enclosed is a copy of a letter of Phyllis Hastings of the Office of General Counsel from Wayne Rowe, CEO of Quality of Life.

Also enclosed is a note written by Drs. Christenberry concerning the services he and his partner, Dr. Godfree, provided Ms. Allen. Neither physician billed the patient privately for this service. I am also enclosing a copy of a contract between Etowah Quality of Life and the subject physicians.

It has been previously requested that a defense be provided to my clients by the Department of Justice. However, this request apparently was never processed. We are now preparing to go to trial on November 26, 2001, in the Circuit Court of Etowah County, Alabama.

The purpose of this letter is to request a certification by the attorney general that my clients were acting within the scope of their employment with the federally-supported program for purposes of substitution of the United States a party defendant under the Federal Tort Claims Act.

In light of the fact that this case is set for trial on November 26, we are obviously under serious time constraints. Accordingly, your expedited attention to this matter is greatly appreciated.

You may contact Mr. Wayne Rowe, CEO of Quality of Life, at 256/492-0131. Also, I would

> appreciate your contacting the undersigned Monday to confirm this request.

See Exhibit 5.[14]

This letter was forwarded to Constance L. Foster ("Foster"), Acting Chief, Litigation Branch of HHS, on November 19, 2001. *See* Exhibit 6. As indicated by Exhibit 6, on November 20, 2001. Foster informed defendants' counsel that HHS had determined that "neither Dr. Christenberry nor Dr. Godfree may be deemed to be employees of the Public Health Service pursuant to the Federally Supported Health Centers Assistance Act." According to Foster, this decision was based on the fact that Drs. Christenberry and Godfree "did not contract directly with the health center but instead provided services pursuant to an intermediate contract signed by a representative of their practice group."[15]

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[14] From aught that appears, this may have been the first actual notice to the Attorney General, See, however, the July 17, 1997 HHS letter which requested that a copy be sent to the Department of Justice.

[15] The letter from the Department also stated that "[b]y operation of 42 U.S.C. § 233(g)(1)(F), the determination by the Department of Health and Human Services that Dr. Christenberry and Dr. Godfree shall not be deemed to be employees of the Public Health Service is final and binding upon the Attorney General and the parties to your action in State court." This court does not agree with either premise. For reasons indicated elsewhere herein, this court is of the opinion that Drs. Christenberry and Godfree did contract directly with EQOL. Further, while it may be clear under the statute that a decision of HHS may be final if HHS determines that the physicians *are* covered contractors, the court finds no statute which states that a contrary decision is final, particularly when contested by arguably covered contractors.

On the same day (November 20, 2001), the United States of America by and through the United States Attorney for the Northern District of Alabama filed a notice in the Circuit Court of Etowah County, Alabama, that the Secretary of Health and Human Services *"has under consideration"* whether Drs. Christenberry and Godfree are to be deemed employees of the Public Health Service. *See* Exhibit 7. The notice was purportedly filed pursuant to 42 U.S.C. § 233(l)(1) but did not purport to *determine* whether Drs. Christenberry and Godfree *were* contractors of EQOL. The notice stated that on November 16, 2001 the Attorney General of the United States was first notified of the existence of the action by virtue of a letter dated November 16, 2001 from private counsel for defendants Christenberry and Godfree to the Director of Torts Branch, Civil Division, U.S. Department of Justice. It also stated that the notice filed by the United States was timely pursuant to 42 U.S.C. § 233(l)(1).

On November 21, 2001, Drs. Christenberry and Godfree filed, for the first time, a Notice of Removal of this action purportedly pursuant to 42 U.S.C. § 233 and 28 U.S.C. §§ 1331, 1346, 1446(b), 2672-80. The remaining defendants consented to removal of the action. It is not clear that such consent would be required under 42 U.S.C. § 233.

ARGUMENTS

Allen makes three primary arguments in support of her motion to remand. First, Allen claims that the

action was untimely removed according to the provisions of 28 U.S.C. § 1446(b).[16] The United States has appeared in support of the plaintiff and makes similar and additional arguments. Allen contends that the defendants believed that the case was removable when they received a copy of the summons and complaint because they filed a Motion to Dismiss on June 26, 1997, stating:

> [D]efendants . . . move the Court . . . 2. [t]o dismiss the action because the Circuit Court of Etowah County, Alabama does not have subject matter jurisdiction for the reason that on the occasion of the incident or incidents made the basis of the plaintiff's complaint the defendant was an employee of the Federal Government.

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[16] That statute provides in relevant part the following:

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant is such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. 1446(b) (1994). These statutory provisions do not specifically address the circumstances applicable to 42 U.S.C. § 233 or 28 U.S.C. §§ 2671 *et seq.*, particularly 28 U.S.C. § 2679.

> [D]efendants . . . move the Court . . . 3. [t]o dismiss the action because the Circuit Court of Etowah County does not have subject matter jurisdiction for the reason that the defendant is covered under the Federal Tort Claims Act pursuant to the provisions of § 224(h) of the Public Health Service Act, 42 U.S.C. 233(h) as amended by the Federally Supported Health Centers Assistance Act of 1995 (Pub. L. 104-73).

In light of these statements, Allen claims that the defendants have known that they had a removable case since June 26, 1997. Consequently, Allen contends that defendants' removal of this action on November 21, 2001 is untimely pursuant to the removal provisions of 28 U.S.C. 1446(b).[17]

Second, Allen argues that this action should be remanded because the doctrines of res judicata, estoppel, issue preclusion, waiver, and laches preclude this court from determining whether the defendants are "federal employees." In support of this proposition, Allen notes that the issue of whether the defendants were "federal employees" was voluntarily submitted to and decided by the Circuit Court of Etowah County. Allen asserts that the defendants' Motion to Dismiss was based on their contentions that they were federal employees. According to Allen, the state court held a hearing on said motion and failed to find that the

[17] It should be noted that the defendants' first duty was to notify their "immediate superior."

defendants were federal employees. Thus, Allen contends, the defendants are now presently barred from presenting this claim.[18]

Finally, Allen argues that this action is due to be remanded because of defendants' contention that a Federal tort Claims Act ("FTCA") case can be removed at any time, pursuant to 28 U.S.C. § 2679, is erroneous. To support this contention, Allen asserts that this action is not a FTCA claim. Instead, Allen argues, her claim is directed at the defendants in their individual capacities for medical malpractice. Allen additionally notes that the claim is not against the United States pursuant to the FTCA. Second, Allen contends that 28 U.S.C. § 2679 does not afford the defendants a provision for removal. According to Allen, 28 U.S.C. § 2679 only provides the United States Attorney General a provision for removing a civil suit against a federal agency or a federal employee acting within the line and scope of his office.[19]

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[18] This court rejects this argument without further discussion. Among other reasons, there has been no final judgment. Further, the state court could not establish jurisdiction if none existed. There may be other reasons.

[19] The statute provides in relevant part:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed by the Attorney General to the district court. . . .
>
> (3) . . . In the event the petition is filed in State court, the action or proceeding may be removed without bond by the Attorney General to the district court. . . .

28 U.S.C. § 2679 (1994).

Allen notes that the Attorney General has not certified that the defendants were acting within the scope of their office or employment and has not removed the action. Additionally, Allen states that the Department of Health and Human Services has directly declined to certify the defendants as "federal employees."[20] Since her action is not a FTCA claim and the Attorney General did not remove it from state court, Allen concludes, this civil action is due to be remanded.

The defendants raise two primary arguments in response. First, defendants contend that the removal was timely pursuant to the requirements of 28 U.S.C. § 1446. In support of this proposition, defendants note that on November 20, 2001 they received the Notice filed by the Attorney General with the Circuit Court of Etowah County, stating that the defendants may be "federal employees." Defendants claim that they removed the action within twenty-four hours of receipt of this Notice. Consequently, they argue that the removal was timely pursuant to 28 U.S.C. § 1446.[21]

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[20] Allen argues that the Department's decision to deny the defendants status as "federal employees" is final and binding upon all parties to this action. *Citing Rendon v. U.S.*, 2001 WL 185526 (E.D. Pa. Feb. 22, 2001) (dismissing medical malpractice complaint as time-barred under the FTCA after substitution of United States as defendant). As indicated elsewhere, this court disagrees.

[21] Defendants contend that the plaintiff's argument that their removal petition was untimely because they allegedly believed that the case was removable when they received a copy of the summons and complaint is without merit. Defendants claim that they cannot create federal jurisdiction in this case by way of a defense to the plaintiff's claims. *Citing Hill v. Marston*, 13 F.3d 1548, 1549 (11th cir. 1994). This

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Second, defendants argue that this court should withhold ruling on the jurisdictional issue until the question of whether the defendants were federal employees is resolved. Defendants state that if Drs. Christenberry and Godfree are federal employees, then the United States is due to be substituted as the proper party defendant and plaintiff's claims would be against the federal government. Consequently, this court would have subject matter jurisdiction pursuant to 28 U.S.C. § 1331. *Relying on* 28 U.S.C. §§ 2671-2690; *Cope v. U.S. Dep't of Justice*, 2000 WL 1024639 (E.D. Pa. July 13, 2000); *Whalen v. U.S.*, 29 F. Supp. 2d 1093 (D.S.D. 1988) (noting that court had jurisdiction of lawsuit against National Park Service based upon 28 U.S.C. § 1331 because the action involved the interpretation of the FTCA).[22] Defendants argue that they are entitled to have the scope-of-employment issue resolved by this court because the determination of whether they are federal employees (or contractors) is a question of law. *Citing Quilico v. Kaplan*, 749 F.2d 480, 483 (7th Cir. 1984). They note that the Eleventh Circuit has not addressed the issue of whether an individual physician who contracts with an eligible entity through his professional corporation is a federal employee. *See Dedrick v. Youngblood*, 200 F.3d 774, 747 n.4 (11th Cir. 2000). However, they note that removal by an employee who may be deemed a federal employee has implicated

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argument may evade the issue. Both of these initial arguments are weak.

[22] The defendants apparently concede that if the claims against them do not fall within the FTCA, then the action is due to be remanded to the Circuit Court of Etowah County, Alabama.

federal jurisdiction notwithstanding the fact that the Attorney General did not certify in state court that the defendant was a federal employee acting within the line and scope of his employment. *Relying on Flahr v. Mackovjak*, 84 F.3d 386 (11th Cir. 1996) (holding that denial of motion to substitute United States as defendant pursuant to the FTCA was an appealable decision since refusal to substitute would have denied immunity to employee afforded under the Act).

Allen makes two primary arguments in reply. First, she contends that the defendants have waived their right to remove this action pursuant to 28 U.S.C. § 1442(a)(1). Allen states that defendants' reliance on 28 U.S.C. § 1446 for the basis of their removal is erroneous because the statute does not confer authority for removal. Instead, Allen asserts that 28 U.S.C. § 1442(a)(1) confers authority for removal of civil actions commenced in state court against a federal officer.[23] Relying on *Palermo v. Rorex*, 806 F.2d 1266 (5th Cir. 1987), *cert. denied*, 484 U.S. 819 (1987), plaintiff argues that 28

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[23] The statute provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending.
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of revenue.

28 U.S.C. § 1442(a)(1) (1994).

U.S.C. § 1442(a)(1) provides an absolute right of removal whenever a suit in a state court is for any action "under color" of federal office, regardless of whether the suit could originally have been brought in federal court. Based on the allegations in defendants' Motion to Dismiss, Allen argues that the defendants were aware that they were being sued in state court for any negligent acts committed within the scope of their federal employment. Consequently, Allen claims that defendants had thirty days from their receipt of the complaint on June 17 and 18, 1997 to remove the action. Since the defendants did not remove the action within thirty days of these dates, Allen contends that they waived their right of removal under 28 U.S.C. § 1442(a)(1).

Second, Allen replies that this action is due to be remanded because the defendants improperly removed this action pursuant to 28 U.S.C. § 233. According to Allen, 28 U.S.C. §§ 233(b) and (1) set forth the events which permit a contractor of a covered entity to remove a case under § 233.[24] Allen claims that the defendants

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[24] Paragraphs (b) and (1) of 42 U.S.C. § 233 provide as follows:

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

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have failed to satisfy these requirements for three reasons. First, Allen notes that appropriate notification under § 233(b) has not been demonstrated because there is no evidence that the defendants delivered "within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers. . . . " 42 U.S.C. § 233(b). Allen claims that the defendants have only presented evidence that Rowe knew of the lawsuit on or before

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. . . .

(l) (1) If a civil action or proceeding is filed in a State court against any entity described in subsection (g)(4) of this section or any officer, governing board member, employee, or any contractor of such an entity for damages described in subsection (a) of this section, the Attorney General, within 15 days after being notified of such filing, shall make an appearance in such court and advise such court as to whether the Secretary has determined under subsections (g) and (h) of this section, that such entity, officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section with respect to the actions or omissions that are the subject of such civil action or proceeding. Such advice shall be deemed to satisfy the provisions of subsection (c) of this section that the Attorney General certify that an entity, officer, governing board member, employee, or contractor of the entity was acting within the scope of their employment or responsibility.

(2) If the Attorney General fails to appear in State court within the time period prescribed under paragraph (1), upon petition of any entity or officer, governing board member, employee, or contractor of the entity named, the civil action or proceeding shall be removed to the appropriate United States district court.

July 1, 1997, and that on said date "made a demand on the Office of the General Counsel for the Department of Health and Human Services to defend this lawsuit on behalf of Drs. Godfree and Christenberry." Allen asserts that Christenberry and Godfree were not employees of EQOL and, consequently, Rowe could not be their "immediate superior."[25] Thus, Allen claims that the defendants have failed to satisfy their duty to prove their compliance with § 233(b).[26]

Next, Allen argues that the defendants should not be afforded the right to remove the petition pursuant to 42 U.S.C. § 233(l) because they have not shown that "whomever was designated by the Secretary to receive such papers" gave appropriate documentation to the appropriate entities as required by 42 U.S.C. § 233(b). Allen argues that the defendants have failed to present evidence that the appropriate person "promptly furnish[ed] copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary." 42 U.S.C. 233(b). Specifically, Allen points out that the United States Attorney for the Northern District of Alabama stated in his Notice Pursuant to 42 U.S.C. § 233(l)(1) "[t]hat on November 16, 2001, the Attorney General of the United States was first notified of the

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[25] Again, a circular argument.

[26] As elsewhere indicated, this court is of the opinion that the defendants delivered or caused to be delivered the appropriate information to Rowe and there is no other person who could be more clearly considered their "immediate superior." None has been suggested by either Allen or the United States.

existence of this action by virtue of a letter dated November 16, 2001, from private counsel for defendants Christainberry [sic] and Godfrey [sic] to the Director of Torts Branch, Civil Division, U.S. Department of Justice." Allen contends that the defendants did not "promptly furnish" notice to the Attorney General by waiting four years after they were served with the summons and complaint.[27]

Finally, Allen argues that the defendants failed to remove the cause within thirty days following the Attorney General's failure to appear in the state action. Allen contends that 42 U.S.C. § 233 and 28 U.S.C. § 1446 should be read in pari materia because 42 U.S.C. § 233 is silent as to the time limitation for removal by the alleged public employee. Relying on *Balfour Beatty Bahamas, Ltd., v. Bush*, 170 F.3d 1048, 1050 (11th Cir. 1999), Allen states that "[i]t is a general rule of statutory construction that a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms."[28] Allen contends that the more specific statute on the issue of the timing for an individual defendant to remove a case is 28 U.S.C. § 1446(b). She claims that the result of reading these statutes together is that the party claiming to be a public employee must remove a case within thirty days of the Attorney General's failure to appear in the state action within fifteen days after notification of the Attorney

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[27] This court is of the opinion that the defendants cannot be held responsible for any such failure by an "immediate superior."

[28] The court agrees with this general principle and, thus, is of the opinion that 42 U.S.C. § 233 controls all issues. This general principle somewhat refutes Allen's other arguments as to removal, etc.

General. Assuming that the defendants gave proper notice to the Attorney General on July 1, 1997, pursuant to 42 U.S.C. § 233(b), the Attorney General then must make an appearance within fifteen days of notice. Since the Attorney General did not make an appearance, Allen argues that the defendants then had thirty days to remove the action after the expiration of the fifteen day period. Allen points out that the defendants did not remove the action within this thirty day period and, thus, she claims that the defendants' removal was untimely pursuant to 28 U.S.C. § 1446(b).[29]

MOTION TO REMAND STANDARD

Federal courts are courts of limited jurisdiction. *See Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (1994). Therefore, federal courts only have power to hear cases that they have been authorized to hear by the Constitution or the Congress of the United States. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The limited nature of federal court jurisdiction has caused the Eleventh Circuit to favor remand of removed cases where federal jurisdiction is not absolutely clear. *Burns*, 31 F.3d at 1095. The removal statute is to be construed narrowly with doubt construed against removal. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107-09 (1941). It is not clear that such general statements apply to procedural issues.

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[29] The court does not recall any evidence that the Attorney General got any notice in 1997 unless Rowe sent her a copy as requested. The court notes, however, that if § 233 controls as a specific statute, it has no time limit.

A case may be removed from state to federal court only if the case could have been brought originally in federal court. *See* 28 U.S.C. § 1441(a). The burden of establishing federal jurisdiction is placed on the removing party with all doubts resolved in favor of remand. *See Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996). A state court action may be removed to federal court based upon diversity or federal question jurisdiction, see 28 U.S.C. § 1441(a), (b), or other specific statutes, see 42 U.S.C. § 233.

ADDITIONAL ANALYSIS

Civil actions commenced in state court for personal injury caused by commissioned officers, employees or contractors of the Public Health Service ("PHS") can be removed to federal court pursuant to the requirements stated in 42 U.S.C. § 233.[30] The remedy against the United States for damage for personal injury, including death,

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[30] The pertinent subsections of 42 U.S.C. § 233 that address the removal procedure are subsections (c), (l)(1), and (l)(2).

> Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by suit within the meaning of subsection (a)

(Continued on following page)

of this section is not available against the United States, a case shall be remanded to the State Court: Provided, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim, in such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

42 U.S.C. § 233(c).

(1) If a civil action or proceeding is filed in a State court against any entity described in subsection (g)(4) of this section or any officer, governing board member, employee, or any contractor of such an entity for damages described in subsection (a) of this section, the Attorney General, within 15 days after being notified of such filing, shall make an appearance in such court and advise such court as to whether the Secretary has determined under subsection (g) and (h) of this section, that such entity, officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section with respect tot he actions or omissions that are the subject of such civil action or proceeding. Such advice shall be deemed to satisfy the provisions of subsection (c) of this section that the Attorney General certify that an entity, officer, governing board member, employee, or contractor of the entity was acting within the line and scope of their employment or responsibility.

(2) If the Attorney General fails to appear in State court within the time period prescribed under paragraph (l), upon petition of any entity or officer, governing board member, employee, or contractor of the entity named, the civil action or proceeding shall be removed to the appropriate United States district court. The civil action or proceeding shall be stayed in such court until such court conducts a hearing, and makes a determination, as to the appropriate forum or procedure for the assertion of the claim for damages described in

(Continued on following page)

> resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, by any commissioned officer or *employee of the Public Health Service* while acting within the scope of his office or employment, *shall be exclusive of any other civil action or proceeding* by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. § 233(a) (emphasis added).[31] *The Attorney General shall defend any civil action brought in any court against an employee of the PHS.* 42 U.S.C. § 233(b).[32] The employee of the PHS must "deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary [of HHS] to receive such papers. . . . " *Id.* This immediate superior is required to promptly furnish copies of the pleading and process to three individuals: 1) the United States attorney

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subsection (a) of this section and issues an order consistent with such determination.

42 U.S.C. §§ 233(l)(1), (l)(2).

[31] 42 U.S.C. § 233(g)(1)(A) provides that a contractor of such an entity as EQOL will be deemed to be an employee of the Public Health Service *if* he or she is "a physician or other licensed or certified health care practitioner." This suggests that the P.C. could not be such a contractor, but that the individual physicians could be. This further supports a conclusion that the contract was between EQOL and the individual physicians. In any event, this court interprets the statute to require that the "immediate superior" notify the Attorney General, etc.

[32] The Attorney General has refused to do so.

for the district embracing the place wherein the proceeding is brought, 2) the Attorney General, and 3) to the Secretary of HHS. *Id.*[33]

The United States relies upon 42 U.S.C. § 233(g)(1)(F) for its argument that a determination of HHS that a person is not a contractor of an entity is final and binding. That section states that such a determination is final and binding if the Secretary deems a person *to be* such a contractor. It does not address a contrary finding. If such a negative finding were final and binding as to contractors, it would likely deny them due process.[34]

The procedure for removal of a civil action filed against an employee of the PHS in state court is the following. The civil action commenced in state court shall be removed to the district court of the United States upon "certification" by the Attorney General that the employee was "acting in the scope of his employment at the time of the incident out of which the suit arose." *Id.* at § 233(c).

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[33] The Government's present argument that the statute provides that the defendants rather than the "immediate superior" are the parties who are required to "promptly furnish copies . . . to the United States attorney . . . ," in this court's opinion, boarders on being frivolous. The court does not recall this argument being made at an earlier oral argument.

[34] In a November 18, 1993 letter, HHS stated:

> Please note that the applicability of the Act to a particular claim or case will depend upon the determination or certification, as appropriate, by the Attorney General *that the individual or grantee is covered by the Act* and was acting within the scope of employment. Such determination or certification is *subject to judicial review*.

(Emphasis added). Covered defendants have a statutory right.

Once the actions is removed by the Attorney General, the proceeding is "deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto." *Id.* at § 233(c). After the case is removed, the district court can conduct a hearing on a motion to remand. If the district court determines that the "case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State Court." *Id.* The Attorney General can remove the action, without bond, at any time before trial. *Id.*

The statute also provides that the employee of the PHS can remove an action filed in state court if the Attorney General does not make an appearance in state court and certify that the employee was acting within the line and scope of his federal employment. The procedure for this provision is as follows. The Attorney General, within fifteen (15) days after being notified of the filing of the state action,

> shall make an appearance in such court and advise such court as to whether the Secretary has determined under subsections (g) and (h) of this section, that such entity, officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section with respect to the actions or omissions that are the subject of such civil action or proceeding. *Such advice shall be deemed to satisfy the provisions of subsection (c) of this section that the Attorney General certify that an entity, officer, governing board member, employee, or contractor of the entity was acting within the scope of their employment or responsibility.*

Id. at § 233(l)(1) (emphasis added). If the Attorney General does not so appear in state court within fifteen (15) days of being notified, then the civil action "shall be removed to the appropriate United States district court" after a petition requesting such action has been field by the employee of the PHS. *Id.*[35] Once the civil action is removed to the United States district court by the employee or contractor of PHS, the proceedings are stayed until the district court "conducts a hearing, and makes a determination, as to the appropriate forum or procedure for the assertion of the claim for damages described in subsection (a) of this section and issues an order consistent with such determination." *Id.* at § 233(l)(2).

There is certainly an inference that Drs. Christenberry and Godfree provided their immediate superior with copies of the summons and complaint with which they were respectively served on June 17 and 18, 1997. That is all that the statute required that *they* do. The Attorney General has not certified under 42 U.S.C. § 233(c) that Christenberry and Godfree were or were not acting in the line and scope of their employment. The only notice filed by the United States in state court action simply stated that HHS "has under consideration, pursuant to the provisions of 42 U.S.C. §§ 233(g) and (h), whether Dr. Kyle Christianberry and Dr. Newton Godfrey, . . . , *are to be deemed employees of the Public Health Service.*" (Emphasis added). This notice is arguably not tantamount to a certification by the Attorney General that Drs. Christenberry and Godfree were employees of PHS acting within

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[35] Again no time limit is prescribed.

the line and scope of their employment, nor in compliance with § 233(l)(1). However, this court notes the following: 42 U.S.C. § 233(l)(1) provides that advice to a state court "as to whether the Secretary has determined . . . that such . . . contractor of the entity is deemed to be an employee of the Public Health Service . . . shall be deemed to satisfy the provisions of subsection (c) of this section that the Attorney General certify that . . . [a] contractor of the entity was acting. . . . " 42 U.S.C. § 233(c) provides that upon "such certification . . . any such civil action . . . commenced in State court *shall be removed* without bond at any time before trial by the Attorney General. . . . " (Emphasis added). If, as the United States has argued, the notice filed by the United States Attorney for the Northern District of Alabama on November 20, 2001 constituted compliance with § 233(l)(1), the action *should have been removed* by the Attorney General before trial. Removal merely complies with that section whether instigated by the Attorney General or the defendants. The U.S. Attorney's "notice" was designated "Notice Pursuant to 42 U.S.C. § (l)(1)", which, in turn, is deemed to be a certification pursuant to § 233(c). The United States acknowledges that this action was removed "the last business day before trial." Apparently § 233 does not contemplate that an action removable under its provisions should proceed to trial in state court if the Attorney General has "appeared" pursuant to § 233(l)(1). Further, apparently, a removal is the only procedure by which such a trial can be prevented. No remedy short of removal has been suggested to this court.

The United States has argued that, "Had the United States not filed that notice, arguably, the defendants would have been able to remove to federal court, under 42

U.S.C. § 233(l)(2). . . . The United States does not, however, address the provisions discussed above which state that such an appearance is tantamount to certification and that when there is a certification, the action *shall be removed*. The United States has indicated that at least one of the reasons that it did not remove this action was because HHS concluded that Christenberry and Godfree were not PHS contractors. This court does not agree with that conclusion.

Drs. Christenberry and Godfree did all that the statute required that they do if Rowe is considered to be their "immediate superior."[36] The statute does not indicate that Drs. Christenberry and Godfree have any more responsibility for the action or inaction of their "immediate superior," etc., that they have for the action or inaction of the Attorney General. 42 U.S.C. § 233(l)(1) provides that the Attorney General, within fifteen days after being notified of a state court filing, "shall make an appearance in such court and advise such court as to whether the Secretary has *determined* under subsections (g) and (h) of this section, that such . . . employee . . . is deemed to be an employee of the Public Health Service" (emphasis added). This "advice" will be deemed to satisfy the Attorney General "certification" requirement found in 42 U.S.C. § 233(c). However, if the Attorney General fails to so appear in state court during the fifteen day time period, then the state court action shall be removed to the

[36] In the absence of any contrary citation of statutory provision(s), controlling case authority or otherwise, this court concludes that the delivery to Rowe constitutes compliance with § 233(b). The United States has not suggested that there is any other designated person.

appropriate United States district court upon petition of the employee or contractor. *See* 42 U.S.C. § 233(l)(2).

As acknowledged by the United States, 42 U.S.C. § 233 does not place a time limit on removals pursuant to its various provisions. 42 U.S.C. § 233(l)(2) does not prescribe a time limit for removals. *Compare Warren v. Joyner*, 966 F. Supp. 581, 583 (S.D. Miss. 1997). The first paragraph of 28 U.S.C. § 1446(b) apparently does not have application to 42 U.S.C. § 233 removals. It is not clear that the second paragraph of said § 1446(b) has application.

CONCLUSIONS OF THE COURT

This court has concludes as follows:

(1) The defendants Christenberry and Godfree timely gave the only notice that they were required to give to their "immediate superior."

(2) The defendants Christenberry and Godfree were included as independent contractors covered by the contract with EQOL and were, thus, entitled to the protections afforded under 42 U.S.C. § 233(a).

(3) The action has been timely removed by the defendants or, by operation of law, has been or should have been removed by the Attorney General.

This case will never be decided because of infallibility, only because of finality. The court will certify the decision of the court not to remand the case pursuant to 28 U.S.C. § 1292(b). That statute should be read carefully for procedural requirements.

An issue which may have to be decided by this court, after removal, is addressed in a letter from HHS dated

November 18, 1993. There may have to be a determination as to whether Christenberry and Godfree are providers "whose medical malpractice liability insurance coverage *does not extend to services performed for this grantee.*" (Emphasis added). It is not clear whether this possible requirement had changed by 1996.

This 30th day of April, 2002.

/s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

KATHY ALLEN, ETC.,	)	
	)	
Plaintiff,	)	
	)	Case No.:
v.	)	CV-01-PT-2992-M
	)	
KYLE CHRISTENBERRY,	)	
ET AL.,	)	
Defendants.	)	

ORDER

(Filed Apr. 30, 2002)

In accordance with a Memorandum Opinion filed contemporaneously herewith, the Motion to Remand filed by the plaintiff on November 27 2001 is **DENIED**. The court is of the opinion, pursuant to 28 U.S.C. § 1292(b), that this order involves a controlling question of law as to which there is *substantial ground* for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. The court is of the opinion that this difference of opinion relates to both unresolved procedural and substantive issues which can only be resolved by a court with controlling authority.

DONE and **ORDERED** this 30th day of April 2002.

/s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES
DISTRICT JUDGE

(2)

No. 03-94

Supreme Court, U.S.
FILED
AUG 12 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KYLE P. CHRISTENBERRY, M.D. and
W. NEWTON GODFREE, M.D.,

Petitioners,

v.

KATHY ALLEN,

Respondent.

On Petition For A Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTION PRESENTED

Did Christenberry and Godfree have a right to remove the state medical malpractice action to federal court after the Attorney General received notice of the action and, within 15 days of such notification, filed a response in the state action pursuant to 42 U.S.C. § 233(l)(1) stating that the Secretary of Health and Human Services was considering Christenberry's and Godfree's claims of federal employee status?

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STATEMENT OF THE CASE

Kathy Allen adopts the statement of the case provided in the Eleventh Circuit's opinion in *Allen v. Christenberry*, 327 F.3d 1290 (11th Cir. 2003) ("*Allen*"). Specifically, Kathy Allen disputes the assertion of Christenberry and Godfree that the Secretary of Health and Human Services (HHS) deemed Christenberry and Godfree to be federal employees. *See* Pet. at 3, 8. In June 1996, the Secretary of HHS deemed Etowah Quality of Life Health Services, Inc. (EQOL) a federally funded community health center within the ambit of the Federally Supported Health Centers Assistance Act. Such a deeming by the Secretary means that EQOL's officers, governing board members, employees, and contractors[1] are Public Health Service (PHS) employees for purposes of 42 U.S.C. § 233. The Secretary of HHS never specifically deemed Drs. Christenberry and Godfree as Public Health Service employees. However, on November 20, 2001, the Secretary of HHS specifically determined that neither Christenberry nor Godfree was a "contractor" of EQOL within the meaning of 42 U.S.C. § 233(g). Accordingly, the Secretary determined that neither person was a PHS employee under 42 U.S.C. § 233 for purposes of the medical malpractice action brought by Kathy Allen.

Christenberry and Godfree contend that the Attorney General was notified of Kathy Allen's lawsuit in July,

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[1] The term "contractor" as used in 42 U.S.C. § 233 includes only the following: a physician or other licensed or certified health care practitioner working full-time, i.e., minimum 32.5 hours per week, or part-time providing family practice, general internal medicine, general pediatrics, or obstetrical/gynecological services. 42 U.S.C. § 233(g).

1997. Pet. at 15-16. Based on that assertion, they contend that their removal of the case on November 21, 2001 was "more than 15 days after the Attorney General received notice of the lawsuit." Pet. at 11. Kathy Allen disputes the time when the Attorney General was first notified of Kathy Allen's lawsuit. The Attorney General in his state court appearance stated, and Kathy Allen agrees, that he was first notified of the lawsuit on November 16, 2001.

Kathy Allen disagrees with Christenberry's and Godfree's assertion that "the Eleventh Circuit did not reverse the Order in as far as it concluded (1) Christenberry and Godfree timely gave the only notice that they were required to give to their immediate superior, (2) Christenberry and Godfree were included as independent contractors covered by the contract with EQOL, and (3) Christenberry and Godfree were entitled to the protections afforded under 42 U.S.C. § 233(a)." Pet. at 10. By holding that the district court did not have removal jurisdiction, the Eleventh Circuit necessarily held void all holdings of the district court in this case for lack of jurisdiction. *Allen*, 327 F.3d at 1292, n. 1.

Kathy Allen also disputes Christenberry's and Godfree's assertion that Christenberry and Godfree contracted as individuals with EQOL rather than through their professional association.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION IN OTHER FEDERAL CIRCUITS.

There have been no cases in any federal circuit court of appeals which have determined the propriety of removal by a party pursuant to 42 U.S.C. § 233. Therefore, there is no conflict between the interpretation of the removal provisions of 42 U.S.C. § 233 by the Eleventh Circuit in this case and interpretations of the removal provisions of 42 U.S.C. § 233 by any other federal circuit court of appeals.

Petitioners attempt to argue that a conflict exists within the Eleventh Circuit but they are only able to cite a footnote in *Green v. Hill*, 954 F.2d 694 (11th Cir. 1992), *withdrawn in part and amended on petition for reh'g*, 968 F.2d 1098 (11th Cir. 1992) ("*Green*") as one of the bases for the claimed conflict. Pet. at 11-12, 26. In *Green*, the Eleventh Circuit merely stated that 28 U.S.C. § 1446(b) does not apply to limit the time for removal by the Attorney General under 28 U.S.C. § 2679(d)(2). The Court in *Green* noted that 28 U.S.C. § 2679(d)(2) specifically provides that the Attorney General's time to remove is "any time before trial." Although 42 U.S.C. § 233(c), like 28 U.S.C. § 2679(d)(2), specifically states the time limit for the Attorney General to remove the case as "at any time before trial," no such statement is made in 42 U.S.C. § 233 about the time within which the case can be removed by a person claiming to be a PHS employee. The Eleventh Circuit held that if the Attorney General was notified in July or August of 1997 as argued by Christenberry and Godfree, then 28 U.S.C. § 1446(b) supplied the time limit (30 days) for removal by persons claiming to be PHS

employees. 42 U.S.C. § 233 does not address such a limitation. The Eleventh Circuit's holding in this regard is consistent with holdings in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995) and *Lazuka v. FDIC*, 931 F.2d 1530, 1536 (11th Cir. 1991) ("*Lazuka*") but is not inconsistent with any holding in other federal circuits.

Christenberry and Godfree also claim that the Eleventh Circuit's opinion in this case conflicts with its holding in *Flohr v. Mackovjak*, 84 F.3d 386 (11th Cir. 1996) ("*Flohr*"). In *Flohr*, the district court denied the United State's motion to substitute and remanded the case to state court. On appeal, the issue was whether the court of appeals had jurisdiction over the appeal. The court held that it had jurisdiction over the appeal of the district court's order denying the motion to substitute under the collateral order doctrine. *Flohr*, 84 F.3d at 390. *Flohr*, unlike this case, was about appellate jurisdiction, not removal jurisdiction.

The district court did, as claimed by Christenberry and Godfree, hold that Christenberry and Godfree were employees of PHS. However, that finding is void if the district court did not first have removal jurisdiction. Thus, Christenberry's and Godfree's assertion that the district court found them to be PHS employees is irrelevant. The inquiry at this stage is whether Christenberry and Godfree established that the district court had removal jurisdiction in the first place.

Christenberry and Godfree had the burden of establishing removal jurisdiction. *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996), *cert. denied*, 520 U.S. 1162 (1997). The Eleventh Circuit held that Christenberry and Godfree did not establish that the district court had

removal jurisdiction. *Allen*, 327 F.3d at 1291-1292. That holding rendered void the district court's finding that Christenberry and Godfree were PHS employees for purposes of the acts forming the basis of Kathy Allen's medical malpractice action.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH GOVERNING SUPREME COURT PRECEDENT.

The U. S. Supreme Court has never interpreted 42 U.S.C. § 233. In fact, very little interpretation of 42 U.S.C. § 233 has occurred in any court. Christenberry and Godfree cite *Califano v. Sanders*, 430 U.S. 99, 105 (1977) as grounds that federal question jurisdiction existed and that they had a right to remove this medical malpractice action to federal court due to the Secretary's refusal to deem them as PHS employees, i.e., adverse agency action. However, *Califano* does not hold that removal from state court to federal court is proper when adverse agency action has some effect on the state action. The underlying state action in this case is a medical malpractice action brought pursuant to the laws of the State of Alabama; it is not a case arising from federal agency action or court review of federal agency action.

Christenberry and Godfree seem to rely on 28 U.S.C. § 1331 as a basis for removal jurisdiction. 28 U.S.C. § 1331 provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331 does not authorize removal of a state action to federal court. Instead, removal jurisdiction

founded on a federal question is conferred by 28 U.S.C. § 1441.[2] That section authorizes removal of "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States. . . . " 28 U.S.C. § 1441(b). Removal jurisdiction under 28 U.S.C. § 1441 is subject to the well-pleaded complaint rule. *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1 (1983) ("*Franchise Tax Bd.*"). The well-pleaded complaint rule requires that "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank in Meridian*, 299 U.S. 109, 112 (1936). "For better or worse . . . a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd.*, 463 U.S. at 10. Furthermore, a defendant cannot create removal jurisdiction under 28 U.S.C. § 1441 by raising a defense arising under federal law. *Id.* Therefore, Christenberry's and Godfree's claims of being PHS employees and thus immune from the state tort action do not confer removal jurisdiction under 28 U.S.C. § 1441.

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[2] Christenberry and Godfree failed to cite 28 U.S.C. § 1441 as a basis for their removal in this Court or in the courts below.

III. THIS CASE DOES NOT SQUARELY PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW WITH SIGNIFICANT PRACTICAL CONSEQUENCES.

The dearth of case law interpreting provisions of 42 U.S.C. § 233 is a testament that this case does not present an important issue of federal law with significant practical consequences. In fact, it is unlikely that the circumstances in this case will ever arise again. In this case, Christenberry and Godfree made an initial attempt in July 1997 to be deemed PHS employees by the Secretary of HHS so that the Attorney General would certify them as acting in the scope of their employment for purposes of Kathy Allen's lawsuit. After having no success in that endeavor and having failed to notify either the Attorney General or the United States Attorney for the Northern District of Alabama about the lawsuit, Christenberry and Godfree then sat on their rights for the next four years until finally notifying the Attorney General on November 16, 2001. Five days later, the Attorney General appeared in state court pursuant to 42 U.S.C. § 233(l). Notwithstanding the appearance of the Attorney General, Christenberry and Godfree removed the case the next day to federal court, immediately before the case was to be tried in state court. Unlike Christenberry and Godfree, persons claiming to be PHS employees for acts underlying a medical malpractice action are unlikely to wait years before ensuring that the Secretary, Attorney General and United States attorney for the district involved are notified of the lawsuit pursuant to 42 U.S.C. § 233(b), especially if they read 42 U.S.C. § 233.

IV. THE DECISION BELOW WAS PROPERLY DECIDED.

The Eleventh Circuit held that the federal district court did not have removal jurisdiction under the specific facts of this case. *Allen*. In so holding, the Eleventh Circuit followed precisely the statutory language of 42 U.S.C. § 233(l) which permitted persons such as Christenberry and Godfree to remove the case only if the Attorney General failed to appear in state court within 15 days of being notified of the lawsuit. The district court determined that "it was not clear whether copies [of certain documents (not including the lawsuit)] were sent [in August 1997] to Einerson" of the Department of Justice. Pet. at 18, n. 11. Therefore, the district court had no evidence to establish that the Attorney General was notified of the lawsuit until November 16, 2001. In fact, the Attorney General stated in filed documents that he was first notified of the lawsuit on November 16, 2001. The Attorney General appeared in state court on November 20, 2001, being within 15 days of November 16, 2001 as required by 42 U.S.C. § 233(l)(1). On November 20, 2001, the Attorney General advised the state court that the Secretary of HHS had under consideration whether Christenberry and Godfree would be deemed PHS employees for purposes of the lawsuit. Therefore, Christenberry and Godfree had no right to remove the case on November 21, 2001 under 42 U.S.C. § 233(l)(2). The Eleventh Circuit in *Allen* succinctly made this point in its opinion. *Allen*, 327 F.3d at 1294-1295.

The district court did not find that the Attorney General received notice of the lawsuit in July or August of 1997. Christenberry and Godfree argued alternatively before the Eleventh Circuit that the Attorney General did receive notice of the lawsuit in July or August of 1997 or

that the Attorney General should have received notice in July or August of 1997. *Allen*, 327 F.3d at 1295. The Eleventh Circuit addressed their alternative argument in its opinion by holding that if the Attorney General was notified in 1997, then Christenberry's and Godfree's time to remove had expired by November 21, 2001 due to the application of the 30-day time limit set forth in 28 U.S.C. § 1446(b). *Id.* This holding is consistent with prior case holdings which have read 28 U.S.C. § 1446 *in pari materia* with other removal statutes having incomplete removal procedures. *See*, e.g., *Lazuka*, 931 F.2d 1530 (11th Cir. 1991).

V. CONSTITUTIONAL ARGUMENTS RAISED BY PETITION FOR WRIT OF CERTIORARI WERE NOT RAISED IN THE COURT BELOW OR IN THE NOTICE OF REMOVAL.

Christenberry and Godfree in their petition raise a due process argument under the Fifth and Fourteenth Amendments to the U. S. Constitution. Pet. at 2, 30. Christenberry and Godfree, however, did not cite any U. S. Constitutional provision in their brief to the Eleventh Circuit as grounds for establishing removal jurisdiction; nor did they cite such a provision in their Notice of Removal filed in the federal district court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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